Argued by Mr Pike for Pltff in Error
Submitted by Mr Morris for Defd in Error
1879

12-68

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 279.

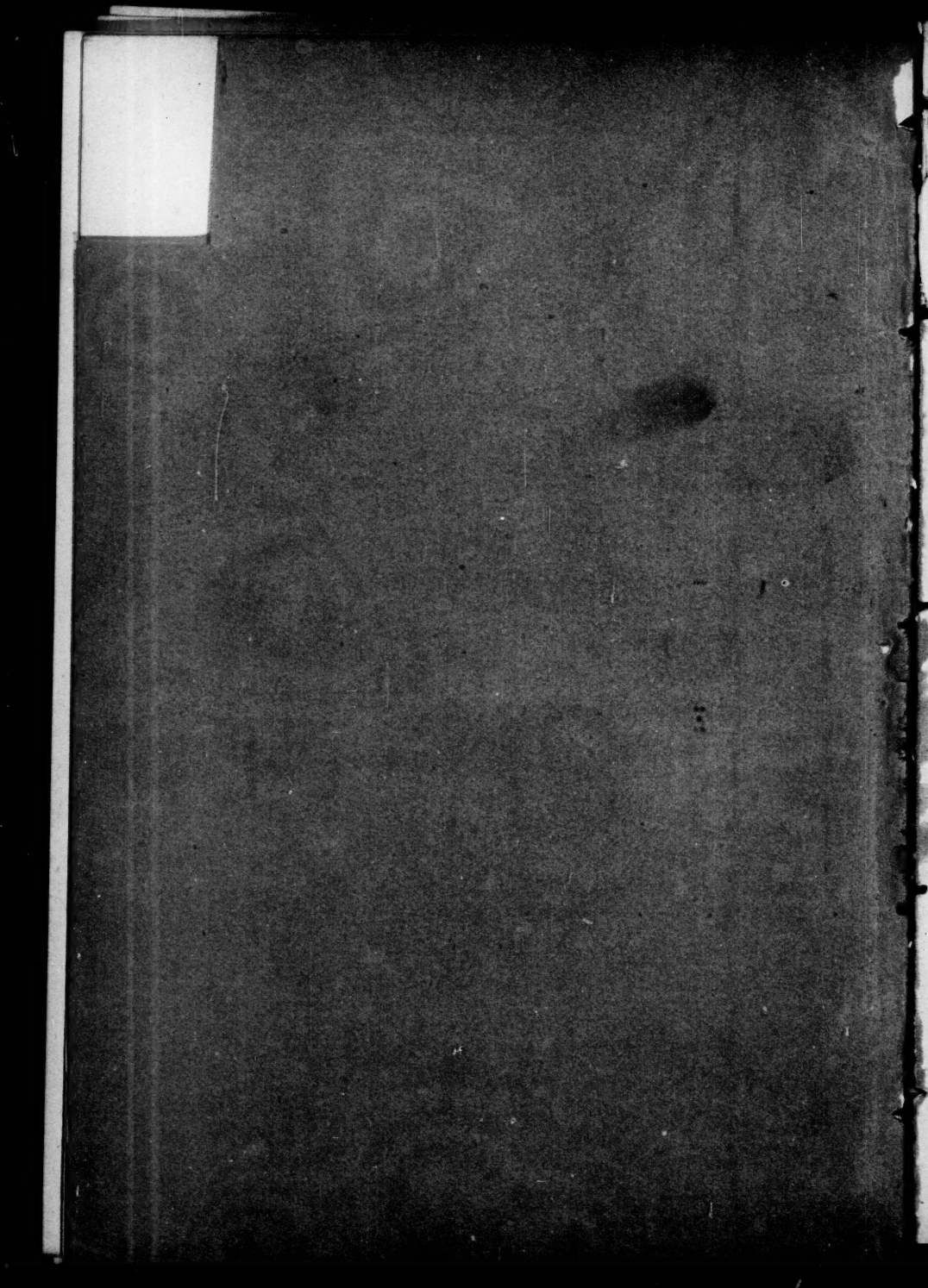
GEORGE E. KIRK, PLAINTIFF IN ERROR,

vs.

CHARLES O. HAMILTON AND CATHARINE HAMILTON.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 12, 1877.



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1 In the supreme court of the District of Columbia the 21st day of December, 1872.

GEORGE E. KIRK, PLAINTIFF,
vs.
CHARLES O. HAMILTON AND CATHARINE HAMILTON, defendants. } At law. No. 10340.

The plaintiff sues the defendants to recover parts of lots numbered seven (7) and nine (9), in square numbered four hundred and thirty-seven (437), in the city of Washington, in the District of Columbia, beginning for said part of said lot nine (9) at a point on South F street eighty-three (83) feet from the northwest corner of said square, and thence south eighty-six (86) feet two (2) inches to the rear of said lot; thence west thirteen (13) feet eight (8) inches; thence north twenty (20) feet; thence west three (3) feet four (4) inches; thence north sixty-six (66) feet two inches to said South F street; thence east with said street seventeen (17) feet to the place of beginning; and commencing for said part of said lot seven (7) at a point on the north line of said lot sixty-nine (69) feet four (4) inches from 8th street west, being the angle formed by the dividing lines between said lot and lot nine (9); thence south twenty (20) feet; thence west three (3) feet four (4) inches; thence north twenty (20) feet; thence east, three (3) feet four (4) inches, with the north line of said lot seven (7) to the place of beginning, of which the said plaintiff has lawfully possessed on the nineteenth day of
2 April, A. D. eighteen hundred and sixty-four, when the defendants entered the same and unlawfully ejected the plaintiff therefrom, and unjustly detain the same from the plaintiff.

And the plaintiff avers that the value of said lands and premises is four thousand dollars.

In the supreme court of the District of Columbia, the 21st day of December, 1872.

GEORGE E. KIRK, PLAINTIFF,
vs.
CHARLES O. HAMILTON AND CATHARINE HAMILTON, defendants. } At law. No. 10340.

The President of the United States to the defendant, greeting:

You are hereby commanded to appear in this court on the first day of its special term, occurring twenty days after service of this writ on you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

D. K. CARTTER,
Chief Justice.
R. J. MEIGS, *Clerk.*

Witness:
GRAY.

In the supreme court of the District of Columbia.

GEORGE E. KIRK
vs.
CHARLES O. HAMILTON AND CATHARINE HAMILTON. } At law. No. 10340.

REC. 279—1

3 The defendants say they are not guilty.

F. H. JONES,
Attorney for Defendants.

JANUARY 2D, 1873.

In the supreme court of the District of Columbia, the 7th day of January, 1873.

GEORGE E. KIRK
vs.
CHARLES O. HAMILTON AND CATHARINE HAMILTON. } At law. No. 10340.

The plaintiff joins issue upon the defendants' plea of "not guilty."

GEO. GRAY,
Attorney for Plaintiff.

In the supreme court of the District of Columbia, the 13th day of January, 1873.

GEORGE E. KIRK, PLAINTIFF,
vs.
CHARLES O. HAMILTON AND CATHARINE HAMILTON, DEFENDANTS. } At law. No. 10340.

GEO. GRAY,
Attorney for Plaintiff.
F. H. JONES,
Attorney for Defendants.

Last pleading filed and issue joined January 7, 1873.
The clerk will please place this cause on the trial calendar for next term.

GEO. GRAY,
Attorney for Plaintiff.

4 In the supreme court of the District of Columbia, May term, 1876, Thursday, June 22.

GEORGE E. KIRK, PLAINTIFF,
vs.
CHARLES O. HAMILTON AND CATHARINE HAMILTON, DEFENDANTS. } At law. No. 10340. Cal. 307.

Now comes here as well the plaintiff by his attorney', Messrs. Pike & Johnson, as the defendants, by their attorney, Mr. Jones, and a jury of good and lawful men of this District, to wit: Alexander H. Dodge, Joseph H. Hilton, John P. Crowley, Isaac Newton, Charles A. Perkins, Thomas M. Killinger, Edwin Knowles, Thomas S. McNeir, George Duvall, Henry C. Addison, William Gibson, and Robert J. Holmes, who, being duly sworn to try the issue above joined, are respited until the meeting of the court to-morrow.

(Minutes, vol. 11, page 537.)

The supreme court of the District of Columbia, May term, 1876, Friday, June 23.

GEORGE E. KIRK, PLAINTIFF,
vs.
CHARLES O. HAMILTON AND CATHARINE HAMilton, defendants.
} At law. No. 10340. Cal. 307.

Now again come here the parties aforesaid in manner aforesaid and the same jury that was respited yesterday, who, after the case is given them in charge, on their oath say they find said issue in favor of the defendants. Therefore it is considered that the plaintiff take nothing by his suit, and that the defendants go thereof without day and recover against the plaintiff the costs of their defence, and have execution thereof.
(Minutes, vol. 11, p. 538.)

5 Supreme court of the District of Columbia, May Term, 1876, Friday, July 7.

GEORGE E. KIRK, PLAINTIFF,
vs.
CHARLES O. HAMILTON AND CATHARINE Hamilton, defendants.
} At law. No. 10340. Cal. 307.

Comes the said plaintiff by his attorneys, and moves the court here to grant him a new trial in said cause, and assigns as grounds thereof as follows, to wit: For errors in the rulings of the court on the trial, and that the jury erred in giving their verdict for the defendants in said cause, said verdict being contrary to the law and the evidence.—(Minutes, vol. 11, p. 541.)

Motion for new trial.

In the supreme court of the District of Columbia, the 26th day of June, A. D. 1876.

GEORGE E. KIRK, PLAINTIFF,
vs.
CHARLES O. HAMILTON AND CATHARINE Hamilton, defendants.
} No. 10340. At law.

Comes the said plaintiff, by his attorneys, and moves the court here to grant him a new trial in said cause, and assigns as grounds therefor as follows, to wit:

1st. That the court, on the trial of said cause had at the present term of the court, erred in allowing the defendants, against plaintiff's objection, to introduce evidence tending to prove that at the time of the defendants' alleged purchase at the sale of the property described in the plaintiff's declaration in said cause, made by Edward C. Carrington, as a supposed trustee in equity cause D. W. Moore & Co. against Geo. E. Kirk and others, numbered 1563, equity docket numbered 6 of the District of Columbia; the only improvements on said property was a two-
story four-room brick house. That about the year 1868 the de-
6 fendants built an extension house on said property at a cost of some four thousand dollars. That at the time they began the erection of said house, and for some time thereafter, the plaintiff resided

adjoining the premises. That during all that time the plaintiff well knew of the said building and made no objection thereto and asserted no claim to said property except to the west three feet thereof, which adjoined the plaintiff's ground, and which the plaintiff claimed as an alley, which he afterwards informed the witness he was mistaken about, and that the plaintiff, though residing in the city of Washington ever since about the year 1865, never, to defendant's knowledge, asserted any claim to the premises in controversy in this suit until the commencement of this suit.

2d. That the court, on the trial of said cause had at the present term of this court, erred in allowing the defendants, against the plaintiff's objection thereto, to introduce to the jury as evidence tending to prove title in the defendants to the property described in the plaintiff's declaration in said cause, the record of the proceedings in the equity cause of D. W. Moore & Co. against George E. Kirk and others, numbered 1563, equity docket numbered 6 of the District of Columbia.

3d. That the court, on the trial of said cause had at the present term of this court, erred in overruling the several objections interposed by the plaintiff to the sufficiency of the record of said proceedings in said equity cause numbered 1563, and of the deed of conveyance executed and delivered by Edward C. Carrington as a supposed trustee in said equity cause No. 1563 to maintain and prove on defendants' behalf the issue joined in said cause, and to establish title in the defendants to the property in controversy in said cause.

4th. That the court, at the trial of said cause had at the present term of this court, erred in holding and maintaining, against the plaintiff's objection thereto, that the record of the proceedings in said equity cause of D. W. Moore & Co. against George E. Kirk and others, numbered 1563, equity docket numbered 6, was good and admissible in law, and it and the deed of conveyance executed and delivered by Edward C. Carrington as a supposed trustee in said equity cause No. 1563 were
7 good and sufficient to maintain and prove on defendants' behalf the issue joined in said cause, and to establish title in the defendants to so much of the property described in plaintiff's declaration in said cause, and sold by Edward C. Carrington as a supposed trustee in said equity cause, as was covered by the original bill filed and decree of May 30th, 1860, passed in said equity cause No. 1563.

5th. That the court, on the trial of said cause had at the present term of this court, erred in directing the jury, against the plaintiff's objection thereto, to give their verdict for the defendants for the property described in the plaintiff's declaration in said cause, and sold by Edward C. Carrington as a supposed trustee in said equity cause No. 1563, equity docket 6, except the east 3 feet thereof.

6th. That the jury erred in giving their verdict for the defendants in said cause, said verdict being contrary to the law and the evidence.

PIKE & JOHNSON, AND
THOS. J. MILLER,
Attorneys for Plaintiff George E. Kirk.

Supreme court of the District of Columbia, May term, 1876, Friday, July 7.

GEORGE E. KIRK, PLAINTIFF,
vs.
CHARLES O. HAMILTON AND CATHARINE Hamilton, defendants.
} At law. No. 10340. Cal. 307.

Upon argument of so much of the plaintiff's motion for a new trial as

is addressed to the discretion of the court, it is considered that the same be and is hereby overruled; and thereupon the plaintiff tenders to the court here his bills of exception to the rulings of the court on the trial of this cause, and prays that they may be duly signed, sealed, and made a part of the record, which is done accordingly.—(Minutes, vol. 11, p. 553.)

8 *Bill of exceptions.*

In the supreme court of the District of Columbia, the day of July, A. D. 1876.

GEORGE E. KIRK, PLAINTIFF,
vs.
CHARLES O. HAMILTON AND CATHARINE Hamilton, defendants. } No. 10340. At law.

FIRST EXCEPTION.

Be it remembered that upon the trial of this cause on the 22d day of June, A. D. 1876, the plaintiff to maintain and prove on his part the issue joined herein gave evidence to the jury tending to prove title in himself to the parcel of land described in his declaration filed herein and his actual possession of said premises under said title; that he had fully paid and satisfied the indebtedness secured by the two deeds of trust he had executed and delivered, one to Lenox and Naylor, and the other to Clark and Smith, trustees; that Charles Stott, on the 14th day of May, A. D. 1872, reconveyed to him all that part of said premises which he, on the 22d day of March, A. D. 1856, had conveyed to said Stott; that he, the plaintiff, had never made any other conveyances than his said two deeds in trust to Lenox and Naylor, and Clark and Smith, trustees, and his said deed to Charles Stott, of any portion of said premises to any person whomsoever, nor had in any manner authorized any one else to do so for him; and, further introduced a deed from Edward C. Carrington as a supposed trustee in case No. 1563, equity docket No. 6, to the defendant, Charles O. Hamilton, for the premises in question, at the same time denying the validity of said deed, introduced subject to his exceptions reserved as to its sufficiency in law to prove title in the defendants, or either of them, to the said property, or any part thereof, to be presented to the court during the further trial of his cause, and admitted by the justice holding said court subject to such exceptions reserved. The plaintiff further gave evidence to the jury to prove that the defendants were in possession of the said property at the time he instituted this suit, and then rested.

9 Thereupon the defendants, to sustain the issue on their part, and to show title out of the plaintiff, offered to introduce in evidence to the jury the records of the proceedings in the chancery cause of D. W. Moore & Co. against George E. Kirk and others, numbered 1563, equity docket No. 6 of the District of Columbia, which record is in the words and figures following: (See copy of said record, Exhibit A, hereunto annexed as part hereof to be taken as if here inserted.) And thereupon the plaintiff's attorney interposed and insisted that said record so offered by the defendants, was not good and sufficient in law to maintain and prove on defendants' behalf the issue aforesaid, or to show title in the defendants, or either of them, to said property or any part thereof, and prayed the said justice to hold and so inform the jury that said

record would not then be admitted in evidence, except subject to their exceptions to the sufficiency thereof in law then reserved by the plaintiff's attorneys, and to be by them afterwards presented to the court pending the further trial of said cause; and the said justice thereupon held and affirmed that said record should be then admitted, subject, however, to the exceptions to the sufficiency in law thereof, then reserved by the plaintiff's attorneys with leave granted to said plaintiff's attorneys to present said exceptions to the court pending the further trial of said cause, and so informed the jury; and thereupon said record was then there so admitted; and thereupon upon the further trial of said cause, on the 23d day of June, A. D. 1876, the defendants, to maintain and prove on their part the issue joined herein, and to prove title in themselves to the premises in question, offered to introduce as evidence to the jury testimony tending to prove that at the time of the defendants' alleged purchase of the property described in the plaintiff's declaration, at a sale thereof made by Edward C. Carrington as a trustee in said equity cause of D. W. Moore & Co. vs. George E. Kirk et al., No. 1563, equity docket No. 6, the only improvements on said property was a two-story four room brick house, and that about the year 1868 the defendant built an extension house on said property at a cost of some four thousand dollars; that at the time they began the erection of said building, and for some time thereafter the plaintiff resided adjoining the premises; that during all that time the plaintiff well knew of said building and made no objection thereto, and asserted no claim to said property, except to the west three feet thereof which adjoined the plaintiff's ground, and which the plaintiff claimed as an alley, which he afterwards informed the witness he was mistaken about; and that the plaintiff, though residing in the city of Washington ever since about the year 1865 never to defendants' knowledge asserted any claim to the premises in question until the commencement of this suit; and thereupon the plaintiff's attorneys interposed and insisted that the said testimony in reference to the defendants putting improvements on the premises in controversy herein, as offered by the said defendants, was not good and admissible in law upon the issue aforesaid, and prayed the said justice so to inform the jury, and that said issue ought to be found for the plaintiff; but the said justice held and affirmed that the said evidence so offered by the defendants was good and admissible in law. Whereupon the attorneys for the plaintiff then and there made their exception to the said opinion of the said justice, who noted the same upon his minutes before the giving of the verdict; and thereupon the defendants gave the said testimony in evidence to the jury, and thereupon the said justice left the consideration thereof to the jury, who gave their verdict against the plaintiff upon the said issue.

And the plaintiff, by his attorneys, requests said justice to put his seal to this, his first bill of exceptions, containing said matter so given in evidence on part of the defendants and the plaintiffs respectively, and the said opinion of the said justice thereon, and the said justice now for then puts his seal hereto, the 6th day of July, A. D. 1876.

[SEAL.] D. C. HUMPHREYS.

Correct.

F. W. JONES,
Attorney for Defendants.
L. H. PIKE,
Attorney for Plaintiff.

SECOND EXCEPTION.

The defendants having on the further trial of said cause on the 23d day of June, A. D. 1876, closed their evidence, the plaintiff's attor-
11 neys thereupon presented to the court their first exception reserved to the sufficiency in law of the record of the proceedings in the equity cause of D. W. Moore & Co. against George E. Kirk and others, No. 1563, equity docket No. 6, theretofore admitted as evidence in said cause on defendants' behalf, subject to said exception then reserved (see copy of said record, Exhibit A, annexed to and part of the plaintiff's first bill of exceptions herein, and made part hereof as if here inserted) to maintain and prove on defendants' behalf the issues joined in this cause, or to show title in the defendants to the property described in the plaintiff's declaration herein; said exception being that said record showed upon its face that said proceedings were in toto beyond the jurisdiction of the equity court of the District of Columbia, were coram non judica and absolutely null and void, and conferred no power or authority upon Edward C. Carrington as trustee, or otherwise, to sell or convey the property described in the plaintiff's declaration herein, or any part thereof, to the defendants, or to either of them, or to any person whomsoever, and thereupon the plaintiff's attorneys pray the justice holding said court to so inform the jury, and that said record was not good and sufficient in law to maintain and prove on defendants' behalf the issue joined in this cause, and show title in the defendants to the said property, and that said issue ought to be found for the plaintiff; but the said justice refused to grant said prayer, and held and affirmed that the said record so offered by the defendants was good and sufficient in law and thereupon left the consideration thereof to the jury; whereupon the plaintiff's attorneys made their exceptions to the said opinion of the said justice, who noted the same upon his minutes before the giving of the verdict; and thereupon, upon consideration thereof, the jury gave their verdict against the plaintiff upon the issue aforesaid; and the plaintiff, by his said attorneys, requests said justice to put his seal to this his second bill of exceptions, containing said record so given in evidence on part of the defendants, and the said opinion of the said justice thereon, and the said justice now for then puts his seal hereto the 6th day of July, A. D. 1876.

[SEAL.] D. C. HUMPHREYS.

Correct.

F. W. JONES,
Attorney for Defendants.
L. H. PIKE,
Attorney for Plaintiff.

12 THIRD EXCEPTION.

Upon the further trial of this cause on the 23d day of June, A. D. 1876, the plaintiff's attorneys presented to this court their second exception reserved to the sufficiency in law of the record of the proceedings in the equity cause of D. W. Moore & Co. against George E. Kirk and others, No. 1563, equity docket No. 6, theretofore admitted as evidence in said cause on defendants' behalf, subject to said exception then reserved (see copy of said record, Exhibit A, annexed to and part of the plaintiff's first bill of exceptions herein, and made part hereof, as if here inserted) to maintain and prove on defendants' behalf the issue joined in this cause, or to show title in the defendants to the property described in the

plaintiff's declaration herein; said exception being that said record showed upon its face that the equity court of the District of Columbia had proceeded as in said cause without jurisdiction therefor from and after its ratification and confirmation, by its order passed in said cause on the 28th day of October, A. D. 1862, of the report made by Edward C. Carrington, trustee, of his sale of lot 78, in square 465; and from and after the confirmation of the auditor's report made in regard to said trustee's account, and to the distribution of the proceeds of said sale, and filed in said cause on the 25th day of November, A. D. 1862; and that the said equity court's actions and proceedings as in said cause thereafter were coram non judica, and absolutely null and void, and conferred no power or authority upon Edward C. Carrington as trustee or otherwise to sell or convey the property described in the plaintiff's declaration herein or any part thereof to the defendants or to either of them or to any person whomsoever, and thereupon the plaintiff's attorneys prayed the justice holding said court to so inform the jury, and that said record was not good and sufficient in law to maintain and prove on defendants' behalf the issue joined in this cause and show title in the defendants to said property or any part thereof, and that said issue ought to be found for the plaintiff; but the said justice refused to grant said prayer and held and affirmed that the said record so offered by the defendants was good and sufficient in law, and thereupon left the
13 same to the consideration of the jury; whereupon the plaintiff's attorneys made their exceptions to the said opinion of the said justice, who noted the same upon his minutes before the giving of the verdict, and thereupon, upon consideration thereof, the jury gave their verdict against the plaintiff upon the issue aforesaid; and the plaintiff by his said attorneys requests said justice to put his seal to this his third bill of exceptions containing said record so given in evidence on part of the defendants, and the said opinion of the said justice thereon, and the said justice now for then puts his seal hereto the 6th day of July, A. D. 1876.

[SEAL] D. C. HUMPHREYS.

Correct.

F. W. JONES,
Attorney for Defendants.
L. H. PIKE,
Attorney for Plaintiff.

FOURTH EXCEPTION.

Upon the further trial of this cause on the 23d day of June, A. D. 1876, the plaintiff's attorneys presented to this court their fourth exception, reserved to the sufficiency in law of the record of the proceedings in equity cause No. 1563, equity docket No. 6, theretofore admitted as evidence in said cause on defendants' behalf, subject to said exception then reserved (see copy of said record, Exhibit A, annexed to and part of plaintiff's first bill of exceptions herein and made part hereof as if here inserted), to maintain and prove on defendants' behalf the issue joined in this cause, or to show title in the defendants to the property described in the plaintiff's declaration herein; said exception being that said record showed on its face that the decree passed in said equity cause on the 30th day of May, A. D. 1860, was fully satisfied by the sale of lot 78 in square 465, made by Edward C. Carrington as trustee under said decree on the 27th day of December, A. D. 1861, and finally

ratified and confirmed by the order of the court, passed in said cause on the 28th day of October, A. D. 1862; and by the distribution of the proceeds of said sale upon the confirmation of the auditor's report thereon, filed in said cause on the 25th day of November, A. D. 1862; that thereafter there was no valid decree or order passed in said cause that
14 authorized or empowered the said Edward C. Carrington to sell, as trustee or otherwise, the property described in the plaintiff's declaration, or any part thereof, to any person whomsoever; that the sale of the said property made by the said Carrington as a supposed trustee of said equity court, on the 19th day of April, A. D. 1864, and said court's ratification and confirmation of his report of said sale, by its order passed as in said cause on the 12th day of December, A. D. 1864, were without any valid decree or order authorizing or sustaining them, and were, therefore, without authority of law, and were corom non judica, and absolutely null and void, and that the defendant Charles O. Hamilton acquired no title to the said property, or any part thereof, by virtue of his purchase at said sale; and thereupon the plaintiff's attorneys prayed the justice holding said court to so inform the jury, and that said record was not good and sufficient in law to maintain and prove on defendants' behalf the said issue, and show title on the defendants or either of them to said property or any part of it, and that said issue ought to be found for the plaintiff; but the said justice refused to grant said prayer, and held and affirmed that the said record so offered by the defendants was good and sufficient in law, and thereupon the said justice left the same to the consideration of the jury; whereupon the plaintiff's attorneys made their exceptions to the said opinion of the said justice, who noted the same upon his minutes before the giving of the verdict, and thereupon, upon consideration thereof, the jury gave their verdict against the plaintiff upon the issue aforesaid, and the plaintiff, by his said attorneys, requests said justice to put his seal to this his fo'rth bill of exceptions, containing said record so given in evidence on part of the defendants, and the said opinion of the said justice thereon, and the said justice now for then puts his seal hereto the 6th day of July, A. D. 1876.

[SEAL.] D. C. HUMPHREYS.

Correct.

F. W. JONES,
Attorney for Defendants.
L. H. PIKE,
Attorney for Plaintiff.

15 FIFTH EXCEPTION.

Upon the further trial of this cause on the 23d day of June, A. D. 1876, the plaintiff's attorneys presented to the court their fifth exception reserved to the sufficiency in law of the deed executed and delivered *to* Edward C. Carrington as a supposed trustee in equity cause No. 1563, equity docket No. 6, to the defendant Charles O. Hamilton, theretofore introduced as evidence by the plaintiff, subject to said exception then reserved, said exception being that the record of the proceedings in said equity cause (see copy of said record, Exhibit A, annexed to and part of the plaintiff's first bill of exceptions herein, and made part hereof as if here inserted) showed upon its face that the said Carrington had no authority or power from said equity court in said cause, as trustee or otherwise, to sell and convey the property described in the plaintiff's declaration herein, or any part thereof, to the defendants or to either of

them from and after the said equity court's confirmation of the auditor's report filed in said cause on the 25th day of November, A. D. 1862, and that said defendants nor either of them could or did acquire any title to said property or any part thereof by virtue of any act or proceeding assumed to have been done or had in said cause thereafter, and that by reason of the want of such power and authority in the said Carrington the said deed executed by him as a supposed trustee was executed and delivered without authority of law, and was absolutely null and void, and that the defendant Charles O. Hamilton acquired no title to said property or any part thereof by virtue of said deed; and thereupon the plaintiff's attorneys prayed the justice holding said court to so inform the jury, and that said deed was not good and sufficient in law to maintain and prove on defendants' behalf the said issue and show title in the defendants or either of them to said property or any part of it, and that said issue ought to be found for the plaintiff; but the said justice refused to grant said prayer, and held and affirmed that the said deed was good and sufficient in law, and thereupon the said justice left the same to the consideration of the jury, whereupon the plaintiff's attorneys made their exceptions to the said refusal and to the said opinion of the said justice, who noted the same upon the minutes before
16 the giving of the verdict, and thereupon, upon consideration thereof, the jury gave their verdict against the plaintiff upon the issue aforesaid, and the plaintiff by his attorneys requests said justice to put his seal to this his fifth bill of exceptions, containing said record, so given in evidence on part of the defendants, and the said opinion of the said justice on said deed, and the said justice now for then puts his seal hereto, the 6th day of July, A. D. 1876.

[SEAL.] D. C. HUMPHREYS.

Correct.

F. W. JONES,
Attorney for Defendants.
L. H. PIKE,
Attorney for Plaintiff.

SIXTH EXCEPTION.

Upon the trial of this cause the justice holding said court, of his own motion instructed the jury that the record of the proceedings in the equity cause No. 1563, equity docket No. 6 (see copy of said record, Exhibit A, annexed to and part of plaintiff's first bill of exceptions herein, and made part hereof, as if here inserted), was the record of a court of competent jurisdiction, and that as such every presumption was to be indulged in in favor of said record's validity, and of the regularity of the proceedings of said equity court therein contained and set forth; that the said proceedings not having been appealed from and standing unreversed and unannulled, the same were valid until reversed and annulled by the proper court upon proper proceedings had therein for that purpose; that said record could not be impeached for want of jurisdiction in this court in this cause, a purely collateral proceeding to said equity cause wherein said proceedings were had; that the said proceedings and the sale made by Edward C. Carrington as trustee in said equity cause, on the 19th day of April, A. D. 1864, of so much of the property described in the plaintiff's declaration herein as was included in the original bill of complaint filed, and the decree of May 30th, 1860, rendered in said equity cause, as the same was ratified and

confirmed by said equity court by its order passed in said equity cause on the 12th day of December, A. D. 1864, was a valid sale and of binding force and effect in this cause and until the
17 same should be reversed, annulled, and set aside by the proper tribunal upon proper proceedings instituted therein for that purpose, and the said justice thereupon directed the jury to find their verdict for the defendants for the said property, except the east three feet front by the depth thereof; and thereupon further instructed the jury that if they should find from all the evidence before them, that said east three feet front by the depth of said property were not included in the original bill filed and the decree of May 30th, A. D. 1860, rendered in said cause, they should give their verdict as to said east three feet for the plaintiff; and thereupon the plaintiff's attorney interposed and made their exceptions to the said opinions and directions of the said justice, except as to so much thereof as directed the jury that if they should find from all the evidence before them that the said east three feet front by the depth of said property were not included in the said original bill filed, and said decree of May 30th, 1860, rendered in said equity cause, they should give their verdict for the plaintiff, as to said east three feet, and the said justice noted the same upon his minutes before the giving of the verdict, and the said justice thereupon left the consideration of said opinions and directions to the jury, who gave their verdict against the plaintiff upon the issue joined in this cause for the whole of said property, and the plaintiff, by his said attorneys, requests said justice to put his seal to this his sixth bill of exceptions, containing the said opinions and directions of the said justice, and the said justice now for then puts his seal hereto the 6th day of July, A. D. 1876.

[SEAL.] D. C. HUMPHREYS.

Correct.

F. W. JONES,
Attorney for Defendants.
L. H. PIKE,
Attorney for Plaintiffs.

18 *Exhibit A to bill of exceptions.*

Original bill.

To the judges of the circuit court of the District of Columbia:

D. W. Moore, trading and doing business under the firm and style of D. W. Moore & Co., being their bill of complaint against George E. Kirk, Walter Lenox, Henry Naylor, Richard H. Clarke, A. Austin Smith, Hugh B. Sweeney, John Robinson, Major Garnett, John H. Goddard, jr., Job W. Angus, Charles Stott, and William S. Martin.

And thereupon your orators complain and say that on the 6th of August, 1856, they obtained judgment against said George E. Kirk, before one G. H. Offutt, a justice of the peace in and for said county of Washington, District of Columbia, for the sum of $30.80 debt, with interest from the 24th of March, 1856, upon which a fi. fa. was issued by justice Thomas C. Donn, a justice of the peace in and for said county, on the 29th of October, 1856, and returned "nulla bona" by G. F. Wollard, constable, the debt and interest and costs upon said judgment and execution at the date aforesaid, amounting in the aggregate to the sum of $38.05⅔, as will more fully and particularly appear by reference to Exhibit A, prayed to be read as part of this bill; and further, that they obtained judgment against the said Kirk before the same justice, on the

7th of August, 1856, for another sum of $30.80, and that a fi. fa. was issued upon said judgment by the said Justice Donn, on the 29th of October, 1856, and returned "nulla bona" by J. F. Wollard, constable, the principal, interest and costs upon said judgment, and execution and costs thereon, amounting in the aggregate to the sum of $38.05¾, all of which will more fully and particularly appear by reference to Exhibit B, prayed to be read as part of this bill of complaint; and further,
19 that they obtained judgment against the said Kirk before the same justice, on the 7th day of August, 1856, upon which, on the 27th day of October, 1856, a fi. fa. was issued by said Justice Donn and returned "nulla bona" by said constable, said judgment and execution and interest and costs thereon, amounting in the aggregate to the sum of $48.20¼, all of which will more fully and at large appear by reference to Exhibit C, hereunto annexed and prayed to be read as part of this bill of complaint. And further, that they obtained judgment against said Kirk before said Justice Offutt, on the 9th of August, 1856, upon which a fi. fa. was issued on the 29th of October, 1856, by the said Justice Donn and returned "nulla bona" by said constable, as will more fully and properly appear by reference to Exhibit D, prayed to be read as part of this bill of complaint; said several sums of money, due as aforesaid, amounting in the aggregate, exclusive of the additional interest that hath properly accrued thereon, to the sum of $163.27¼.

And your orators further charge that they do not know of any property of the said George E. Kirk upon which execution upon his said judgment could be levied and his said debt and costs satisfied.

But your orators are informed and believe that the said George E. Kirk is the owner of large real estate in the city of Washington, which he has conveyed away for the purpose of delaying, hindering, and defrauding your orators in the recovery of their said debts, but of the particulars of such conveyance and the property so owned by him your orators are not informed further than hereinafter mentioned; that the only property so conveyed which is known to your orators consists of the following-described parcels of ground in the city of Washington, with the improvements thereon, that is to say, lot No. 78 in the subdivision of square No. 465, and parts of lots 7, 9, 10, 11, and 12 in square No. 437; that the said George E. Kirk, by deed dated the 9th of August, 1853, and recorded in liber J. A. S. No. 84, folios 149, etc., one of the land records of Washington County for the District of Columbia, part of lot No. 9, and part of lot No. 7 to the said Walter Lenox and Henry Naylor, in trust to secure to the Washington Building Association the payment of the sum of money therein mentioned, and that on the
20 24th day of March, 1856, by his deed of that date, recorded in liber J. A. S. No. 114, folios 358, etc., one of the land records aforesaid, he conveyed a portion of the same to the said Richard H. Clarke and A. Austin Smith, in trust to secure to the said Hugh B. Sweeney the payment of a promissory note for one thousand six hundred dollars mentioned in said deed; that the said George E. Kirk, by deed dated the 14th of April, 1854, and recorded in liber J. A. S. No. 76, folios 30, &c., one of the land records aforesaid, conveyed part of lot No. 10 and part of lot No. 12, in said square No. 437, to the said John Robinson, in trust to secure to the said Major Garnett the four promissory notes mentioned in said deed, each for the sum of one hundred and thirty-one dollars and twenty-five cents, at the times mentioned in said deed; that the said George E. Kirk, by deed dated the 13th day of October, 1854, and recorded in liber J. A. S. No. 97, folios 191, &c., one of the land records aforesaid, conveyed the west half of

lot No. 11, in said square No. 437, to the said John H. Goddard, jr., in trust to secure unto the said Job W. Angus the payment of the promissory note at twelve months for five hundred dollars mentioned in said deed of trust.

And your orators further show that it is provided in said deeds that if the said several debts therein mentioned should not be paid at the times therein mentioned, then the said parcels of ground thereby conveyed should be sold and the purchase money be applied to the payment of such debts, and that any residue should be paid to the said Geo. E. Kirk, all of which will more fully and at large appear by reference to said deeds, which your orators pray may be read and taken as parts of this bill; and your orator further avers that on or about the 22d of April, 1858, said George E. Kirk purchased other property, to wit, parts of lots 43, 44, 45, and 46, in square 465, as the same is subdivided, of the said Wm. S. Martin, which was conveyed to him, however, by deed purporting to be a deed to him as trustee for the benefit of his wife and children, bearing date on the 22d of April, 1858, and recorded in liber J. A. S. No. 158, folios 93, &c., one of the land records of Washington County, District of Columbia, which said deed is prayed to be produced from said land records, and considered and read as part of this bill of complaint. And where your honors are prayed to
21 observe a more full and accurate description of said property last mentioned, and the terms and provisions of said deed, and determine its true character. For your orators aver that the said George E. Kirk negotiated with the said Martin for said last-mentioned property and paid the purchase money therefor, and has both the legal and equitable title therefor, and that it was conveyed as aforesaid for the purpose of defrauding, hindering, and delaying his creditors. And the said William S. Martin is prayed to be made a party defendant to this bill of complaint and to discover upon oath all he may know appertaining thereto, and full answer make to the following interrogatories: Did not the said Kirk negotiate with him for said last-mentioned property, and did he, said Kirk, not pay him the purchase money therefor?

Your orators do not admit that the said debts mentioned in the said deeds are due and owing, but they deny the same and require proof thereof, and that the notes and other evidences of such debts be produced. They say, however, that if the same, or any of them or any part thereof be really due and owing and not paid off by said Kirk, the property so conveyed is of much greater value than the amount so due, and that the equitable estate and interest of said George E. Kirk in said property are, as your orators are informed and believe, liable in equity for the payment of their said judgments.

And your orators further show that no sales have been made of said parcels of property, or any of them, or any part thereof, under the said deeds or any of them, but the same have been ever since the making of said deeds, and now are, held, possessed, and enjoyed by the said George E. Kirk, and the rents and profits thereof received by him. Your orators charge that the said deeds were made with the design of delaying, hindering and defrauding in the recovery of their said debts; that none of the said debts mentioned in said deeds were ever really due, or that they have since been paid off, and that the said deeds are void as against your orators and ought to be removed out of their way; but if the said debts, or any of them, or any part thereof be now due and owing, then your orators submit that they are entitled to have the said property sold, first, for the payment of any part of said debts which may be due and owing, and next, for the amount due your orators for or on

22 their said judgments, or, that if a sale or sales be made under the said deeds or any of them, then your orators are entitled to be paid their said judgments out of the purchase money which may come to the hands of said trustees after satisfying such amount as may be due or showed to be due on account of said debts, if any such really existed and are now due; and that the said trustees ought to bring the money which may arise from the sale of said premises into court for distribution under the directions of your honors.

And your orators further show that on the 22d of March, 1856, the said George E. Kirk, by his deed of that date, recorded in liber J. A. S. No. 115, folios 423, &c., one of the land records aforesaid, for the pretended consideration of four thousand dollars therein mentioned, conveyed unto the said Charles Stott, his heirs and assigns, lot No. seventy-eight (78), in the subdivision of square number four hundred and sixty-five (465), and parts of lots Nos. seven (7), nine (9), ten (10), eleven (11), and twelve (12), in square No. four hundred and thirty-seven (437), in said city, all of which will more fully and at large appear by reference to said deed, which your orators pray may be referred to and taken as part of this bill.

And your orators charge and aver that the statement in said deed of the said sum of four thousand dollars having been paid is utterly false; that the said conveyance was purely voluntary, and was designed to delay, hinder, and defraud your orators in the recovery of their said judgments, and has so delayed, hindered and defrauded them. And that ever since the execution of said conveyance the said George E. Kirk has remained in the possession and enjoyment of all the said property, and has received the rents and profits of the same; but if the said sum of four thousand dollars, or any other sum was advanced by the said Charles Stott to the said George E. Kirk, then your orators aver and charge that the said conveyance, although absolute upon its face, was upon a secret trust to reconvey the said property to the said George E. Kirk upon the repayment of the amount so advanced, and that as your orators are advised that said Charles Stott will be treated in a court of equity merely as a mortgagee to the amount actually advanced by him. And your orators pray to be allowed to bring in such other parcels of property as they may hereafter discover the

23 said George E. Kirk may have conveyed away with the design of delaying, hindering and defrauding your orators as aforesaid, or of securing any debt or debts, and to make all proper parties when discovered. In consideration whereof, and forasmuch as your orators are without relief at common law and can obtain redress only in your honorable court as a court of equity, and to the end that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answers make to all and singular the matters and things herein contained as fully as if the same were here repeated and they were specially interrogated thereto, and especially to such of the several interrogatories hereinafter numbered and set forth as by the note hereinafter and hereunder written they are respectively required to answer, that is to say:

1st. Whether the debt mentioned in the said deed from the said George E. Kirk to the said Walter Lenox and Henry Naylor was ever due and owing; what was the amount thereof; what was the consideration thereof; whether the same, if ever existing, has not since the date of

said deed been paid off and discharged fully and entirely, and if not fully, how much has been paid, and what amount is now due on account of the same.

2d. Whether the debt mentioned in the said deed from the said George E. Kirk to the said Richard H. Clarke and A. Austin Smith was ever due and owing; what was the amount thereof; what was the consideration thereof; whether the same, if ever existing, has not since the date of the said deed been paid off and discharged fully and entirely, and if not fully, how much has been paid, and what amount is now due on account of the same.

3d. Whether the debt mentioned in the said deed from the said George E. Kirk to the said John Robinson was ever due and owing; what was the amount thereof; what was the consideration thereof; whether the same, if ever existing, has not since the date of said deed been fully and entirely paid off and satisfied, and if not fully, how much has been paid, and what amount is now due on account of the same.

24 4th. Whether the debt mentioned in the said deed from the said George E. Kirk to the said John H. Goddard, jr., was ever due and owing; what was the amount thereof; what was the consideration thereof; whether the same, if ever existing, has not since the date of the said deed been paid off and discharged fully and entirely, and if not fully, how much has been paid, and what amount is now due on account of the same.

5th. Whether any portion and how much of the said sum of four thousand dollars, mentioned in the said deed from the said George E. Kirk to the said Charles Stott, was ever paid by the said Stott, and if so paid at what time, in what manner, in whose presence, and to whom.

6th. Whether said George E. Kirk is not still in the occupation of the premises so conveyed to the said Stott, or some part thereof; and if so, what part; how long he has so occupied; whether he has paid rent for the same, and to whom, and when he has paid such rent, and the amount thereof.

7th. Whether the said George E. Kirk has collected any of the rents of the property so conveyed to the said Charles Stott, accruing since the execution of said deed, and, if so, at what time, how much, from what portion of said property, of what persons, and whether he has paid over the same to the said Stott, or according to his order or direction.

That the said deed from the said George E. Kirk to the said Charles Stott may be decreed to be utterly null and void as against your orators. That the said parcels of ground and premises described in said deed and in the above mentioned deeds of trust respectively, or a sufficient part thereof, may be sold under the direction and control of this honorable court for the payment, first, of such sums as may be shown to be due on account of said debts, and next of the amount or amounts due to your orators on their judgments, and the costs of this suit. And that your orators may have such further and other relief as their case may require—

May it please your honors to grant unto your orators the writ of subpœna, directed to the said George E. Kirk, Walter Lenox, Henry Naylor, Richard H. Clarke, A. Austin Smith, Hugh B. Sweeney, John Robinson, Major Garnett, John H. Goddard, jr., Job W. Angus,

25 and Charles Stott, and William S. Martin, and commanding them to appear by a day to be named, and abide by and perform such

22 their said judgments, or, that if a sale or sales be made under the said deeds or any of them, then your orators are entitled to be paid their said judgments out of the purchase money which may come to the hands of said trustees after satisfying such amount as may be due or showed to be due on account of said debts, if any such really existed and are now due; and that the said trustees ought to bring the money which may arise from the sale of said premises into court for distribution under the directions of your honors.

And your orators further show that on the 22d of March, 1856, the said George E. Kirk, by his deed of that date, recorded in liber J. A. S. No. 115, folios 423, &c., one of the land records aforesaid, for the pretended consideration of four thousand dollars therein mentioned, conveyed unto the said Charles Stott, his heirs and assigns, lot No. seventy-eight (78), in the subdivision of square number four hundred and sixty-five (465), and parts of lots Nos. seven (7), nine (9), ten (10), eleven (11), and twelve (12), in square No. four hundred and thirty-seven (437), in said city, all of which will more fully and at large appear by reference to said deed, which your orators pray may be referred to and taken as part of this bill.

And your orators charge and aver that the statement in said deed of the said sum of four thousand dollars having been paid is utterly false; that the said conveyance was purely voluntary, and was designed to delay, hinder, and defraud your orators in the recovery of their said judgments, and has so delayed, hindered and defrauded them. And that ever since the execution of said conveyance the said George E. Kirk has remained in the possession and enjoyment of all the said property, and has received the rents and profits of the same; but if the said sum of four thousand dollars, or any other sum was advanced by the said Charles Stott to the said George E. Kirk, then your orators aver and charge that the said conveyance, although absolute upon its face, was upon a secret trust to reconvey the said property to the said George E. Kirk upon the repayment of the amount so advanced, and that as your orators are advised that said Charles Stott will be treated in a court of equity merely as a mortgagee to the amount actually advanced by him. And your orators pray to be allowed to bring in such other parcels of property as they may hereafter discover the

23 said George E. Kirk may have conveyed away with the design of delaying, hindering and defrauding your orators as aforesaid, or of securing any debt or debts, and to make all proper parties when discovered. In consideration whereof, and forasmuch as your orators are without relief at common law and can obtain redress only in your honorable court as a court of equity, and to the end that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct and perfect answers make to all and singular the matters and things herein contained as fully as if the same were here repeated and they were specially interrogated thereto, and especially to such of the several interrogatories hereinafter numbered and set forth as by the note hereinafter and hereunder written they are respectively required to answer, that is to say:

1st. Whether the debt mentioned in the said deed from the said George E. Kirk to the said Walter Lenox and Henry Naylor was ever due and owing; what was the amount thereof; what was the consideration thereof; whether the same, if ever existing, has not since the date of

said deed been paid off and discharged fully and entirely, and if not fully, how much has been paid, and what amount is now due on account of the same.

2d. Whether the debt mentioned in the said deed from the said George E. Kirk to the said Richard H. Clarke and A. Austin Smith was ever due and owing; what was the amount thereof; what was the consideration thereof; whether the same, if ever existing, has not since the date of the said deed been paid off and discharged fully and entirely, and if not fully, how much has been paid, and what amount is now due on account of the same.

3d. Whether the debt mentioned in the said deed from the said George E. Kirk to the said John Robinson was ever due and owing; what was the amount thereof; what was the consideration thereof; whether the same, if ever existing, has not since the date of said deed been fully and entirely paid off and satisfied, and if not fully, how much has been paid, and what amount is now due on account of the same.

24 4th. Whether the debt mentioned in the said deed from the said George E. Kirk to the said John H. Goddard, jr., was ever due and owing; what was the amount thereof; what was the consideration thereof; whether the same, if ever existing, has not since the date of the said deed been paid off and discharged fully and entirely, and if not fully, how much has been paid, and what amount is now due on account of the same.

5th. Whether any portion and how much of the said sum of four thousand dollars, mentioned in the said deed from the said George E. Kirk to the said Charles Stott, was ever paid by the said Stott, and if so paid at what time, in what manner, in whose presence, and to whom.

6th. Whether said George E. Kirk is not still in the occupation of the premises so conveyed to the said Stott, or some part thereof; and if so, what part; how long he has so occupied; whether he has paid rent for the same, and to whom, and when he has paid such rent, and the amount thereof.

7th. Whether the said George E. Kirk has collected any of the rents of the property so conveyed to the said Charles Stott, accruing since the execution of said deed, and, if so, at what time, how much, from what portion of said property, of what persons, and whether he has paid over the same to the said Stott, or according to his order or direction.

That the said deed from the said George E. Kirk to the said Charles Stott may be decreed to be utterly null and void as against your orators. That the said parcels of ground and premises described in said deed and in the above mentioned deeds of trust respectively, or a sufficient part thereof, may be sold under the direction and control of this honorable court for the payment, first, of such sums as may be shown to be due on account of said debts, and next of the amount or amounts due to your orators on their judgments, and the costs of this suit. And that your orators may have such further and other relief as their case may require—

May it please your honors to grant unto your orators the writ of subpœna, directed to the said George E. Kirk, Walter Lenox, Henry Naylor, Richard H. Clarke, A. Austin Smith, Hugh B. Sweeney, John Robinson, Major Garnett, John H. Goddard, jr., Job W. Angus,

25 and Charles Stott, and William S. Martin, and commanding them to appear by a day to be named, and abide by and perform such

order and decree as may be passed in the premises; and your orators will ever pray, &c.

CARRINGTON & LLOYD,
Solicitors for Complainants.

The defendant, George E. Kirk, is required to answer the interrogations numbered, respectively, 1, 2, 3, 4, 5, 6, and 7.

The defendant, Hugh B. Sweeney, is required to answer the interrogatory numbered 2.

The defendant, Major Garnett, is required to answer the interrogatory numbered 3.

The defendant, Job W. Angus, is required to answer the interrogatory numbered 4.

The defendant, Charles Stott, is required to answer the interrogations numbered respectively, 5, 6, and 7.

CARRINGTON & LLOYD,
Attorneys for Plaintiffs.

(Endorsed:) 1563. D. W. Moore & Co. vs. in chancery, George E. Kirk, Walter Lenox, Henry Naylor, Richard H. Clarke, A. Austin Smith, Hugh B. Sweeney, John Robinson, Major Garnett, John H. Goddard, Job W. Angus, Charles Stott, William S. Martin.

The clerk will file this bill and issue in the above cause.

CARRINGTON & LLOYD,
Solicitors for Complainants.

Filed 21st November, 1859.

EXHIBIT A.

Geo. E. Kirk and wife to Lenox & Naylor. Deed of trust recorded 17th August, 1854. Liber J. A. S. No. 84, fol. 149.

26 This indenture, made this ninth day of August, in the year of our Lord one thousand eight hundred and fifty-three, between George E. Kirk, and Rebecca Jane, his wife, of the county of Washington, in the District of Columbia, of the first part, and Walter Lenox and Henry Naylor, trustees as hereinafter named, of the same place, of the other part.

Whereas the said George E. Kirk by certain articles of agreement dated the first day of June, in the year 1847, and other his associates, who have executed the same, have formed themselves into a voluntary society, or company, by the name of the Washington Building Association, for the purpose of accumulating a fund by the savings of the members thereof, sufficient to enable the stockholders to build or purchase for themselves, respectively, dwelling houses or such other real estate as they may deem advantageous; and have for the organization of said company, and the management of its affairs, adopted certain articles, rules, and regulations, entitled the constitution of said society, the same being annexed to said articles of said agreement, and made part thereof, and in conformity with its provisions have appointed certain persons as the officers and directors of said company;

And whereas it is therein provided that each and every stockholder, for each and every share of stock that they hold in said association, shall pay the sum of one dollar (in bankable fund) on the 15th day of each and every month, to the treasurer of said association, or such other

person or persons as shall from time to time, by the laws or regulations thereof, be authorized to receive the same, until the value of the whole stock shall be sufficient to divide to each share of stock the sum of two hundred dollars;

And whereas it is further provided that each stockholder, for neglecting or refusing to pay his monthly dues each and every month, as the same shall become due and payable, shall forfeit and pay a fine of ten cents for each share of stock held by him, for each and every such monthly neglect and refusal to be charged with the monthly dues; and further, when each and every stockholder for each and every share of stock by him or them held, shall have received the sum of two hundred dollars or property to that amount, then the association shall determine and close;

27 And whereas it is further provided that each and every stockholder for each and every share of stock that he or they may hold in the association shall be entitled to receive a loan of two hundred dollars from the funds thereof, upon certain terms and conditions, with interest thereon payable monthly, the said loan or principal sum repayable in the following manner, to wit, by the payment of the monthly interest thereon each and every month, and also the payment of the monthly dues as aforesaid, each and every month as the same respectively shall become due and payable until such time that the said association shall determine and close, as hereinbefore mentioned and provided for: Provided, however, that in the event of the non-payment of the said interest and the monthly dues as aforesaid, or either of them, at such time as the same shall respectively become due and payable, then in such case that the said loan shall be demandable by and repayable into the said association, with all interest due thereon, and also all monthly dues in arrears, together with all fines incurred for the nonpayment of the same;

And whereas the said George E. Kirk being a stockholder in said company to the extent of three shares, has received as a loan therefrom the sum of six hundred dollars, for which said sum has given his obligation under seal, bearing date the 15th day of March, 1849, drawn Joel W. Jones, then the treasurer of said association, or his successor in office, and payable upon the terms and conditions herein set forth, as also therein prescribed, with interest thereon, payable monthly, and in addition thereto, also for the monthly dues of one dollar per month for each of said shares of stock held by him as aforesaid, payable monthly, commencing the fifteenth day of June, 1847, and continuing from time to time until the said association shall determine and close as hereinbefore mentioned;

And whereas the said George E. Kirk for the purpose of securing the payment of his obligation according to the true intent and meaning thereof, as also of any other given by way of renewal or in lieu thereof, has agreed to execute these presents;

Now, this indenture witnesseth that the said George E. Kirk and wife, in consideration of the premises, and in further consideration of

28 the sum of five silver dollars to them in hand paid by the said parties of the second part before the sealing and delivery thereof, the receipt of which they do hereby acknowledge, have given, granted, bargained and sold, released and conveyed, and do hereby give, grant, bargain and sell, release and convey unto the said Walter Lenox and Henry Naylor, their heirs and assigns, the following piece or parcel of ground, lying and being in the said city of Washington and known as

part of lot numbered nine (9), in square numbered four hundred and thirty-seven (437), and contained within the metes and bounds following —that is to say, beginning for the same at the northwest corner of said lot and running thence due south sixty-six feet two inches, thence due east nineteen feet four inches, thence due north sixty-six feet two inches, and thence due west by and with the line of F street south nineteen feet four inches to the place of beginning, together with all and singular the improvements, ways, rights, privileges, and other hereditaments, with appurtenances thereunto belonging, or in any way appertaining, and the reversions and remainders, rents, issues, and profits thereof, and the estate, right, title, and interest whatsoever of them and each of them, the said George E. Kirk and wife, both of law and in equity of, in, and to the said part of lot with appurtenances, and all and singular the premises hereby bargained and sold, or intended hereby so to be, and every and any part or parcel thereof.

To have and to hold the said part of lot, with the appurtenances and all and singular the premises aforesaid unto them, the said Walter Lenox and Henry Naylor, their heirs and assigns, and the heirs and assigns of the survivor of them, for the use and trust hereinafter mentioned—that is to say, upon trust to permit the said George E. Kirk to have, hold, use, occupy, possess, and enjoy the said part of lot with appurtenances, and all and singular the premises heretofore granted, until default made in the monthly payment of interest upon said sum of loan of six hundred dollars, and the monthly dues as aforesaid as the same, or either of them shall from time to time respectively become due, during the continuance of said association as hereinbefore set forth; and if the said George E. Kirk, his executors, administrators,
or assigns shall pay the said monthly interest and dues as afore-
29 said, together with all fines and costs which shall have become chargeable and payable on account of the said dues, for, during, and until such time the said association shall continue as hereinbefore set forth, then to release the said part of lot and premises with the appurtenances to and unto the said George E. Kirk, his heirs and assigns.

And upon this further trust, that if the said George E. Kirk, his executors and administrators, shall pay or cause to be paid the monthly payments of interest upon said loan of six hundred dollars, commencing from the sixteenth day of August, 1853, or any one of them, as the same from time to time shall become due and payable, or shall fail to pay or cause to be paid the monthly due of one dollar for each and every of said three shares of stock as aforesaid each and every month that the same shall become due and payable for, during and until such time that the said association shall determine and close, as hereinbefore mentioned and declared, then, upon the non-payment of any one of said monthly payments of interest, or any one of said monthly dues, that in either of such cases, upon the request in writing of the treasurer of said association at the time being, it shall and may be lawful for the said Walter Lenox and Henry Naylor, and the survivor of them, his heirs and assigns, to sell the said part of lot with the appurtenances, and all and singular the premises hereinbefore granted, at public auction, to the highest bidder therefor, and before such sale they or he shall give public notice thereof, by advertisement in some newspaper printed and published in the city of Washington, setting forth the time, place, and terms of sale, and which advertisement shall be inserted at least twice a week for four successive weeks previous to the day of sale, which time, place, and terms of sale are hereby left to the sound discretion of the

said trustees; and they shall also have the right of postponing said sale as to them may seem proper, and upon the full compliance by the purchaser thereat with the terms and conditions of the same, the said trustees and the survivor of them, his heirs and assigns, are hereby authorized and empowered to make and execute to such purchaser and his heirs a good and sufficient deed in fee simple for the said part of lot and premises with the appurtenances hereinbefore granted, and of the
30 proceeds of sale pay in the first place the cost and expenses incident to the execution of this trust, including a reasonable compensation to themselves for their trouble and responsibility not exceeding five per cent. upon the gross amount of said sale, next pay the said sum of six hundred dollars, with all interest due thereon up to the day of such payment, and the aforesaid monthly dues with all fines and charges due thereon, in arrears at the time of said sale, and the residue (if any) pay over to the said George E. Kirk, his executors, administrators, assigns; and the said George E. Kirk, for himself, his heirs, executors, and administrators, covenants, promises and agrees to and with the said trustees and the survivor of them, his heirs and assigns, that he and they shall and will insure the said premises in some insurance company approved of by the board of directors at the time being of the said association hereinbefore described as the Washington Building Association, in the sum of two hundred dollars, against damage by fire, and renew the same from time to time during the continuance of this trust, and will assign the said policy of insurance to the said trustees and the survivor of them, his heirs and assigns, upon the trust, that in case of the destruction or damage of said premises by fire they shall receive the insurance money due from said company, and hold or apply the same as they shall deem best to carry out, effect, and secure the objects, terms, conditions, and provisions recited and set forth in these presents.

And in default of the said George E. Kirk insuring said premises as aforesaid, and assigning the same as herein acquired, it shall and may be lawful for the said trustees, and the survivor of them, his heirs and assigns, to effect such insurance, and the premium paid for effecting the same shall be a lien on said premises, added to the amount of said debt and secured by these presents, and the said George E. Kirk, for himself, his heirs, executors, and administrators, doth hereby covenant and agree to and with the said trustees and the survivor of them, his heirs and assigns, that if the said trustees or the survivor of them, his heirs and assigns, being thereto required as aforesaid, shall make any sale as aforesaid, that then, and in such case, he, the said George E. Kirk and his heirs shall, when thereto reasonably required by the said trustees or the survivor of them, his heirs and assigns, or by any pur-
31 chaser at such sale, his heirs or assigns (they fully complying with and performing the said terms and conditions of sale) make, execute, acknowledge and deliver such other and further deeds and assurances as shall be proposed for him or them to execute (free of expense to them) fully and completely, to convey and assure the said part of lot and appurtenances, with all and singular the premises hereinbefore conveyed to such purchaser, his heirs and assigns.

In testimony whereof the said George E. Kirk and wife have hereto set their hands and seals the day and year first hereinbefore written.

G. E. KIRK. [SEAL.]
REBECCA J. KIRK. [SEAL.]

Signed, sealed, and delivered in presence of us—
J. H. GODDARD.
T. C. DONN.

DISTRICT OF COLUMBIA,
Washington County, to wit:

We, J. H. Goddard and Thomas C. Donn, justices of the peace in and for the county aforesaid, do hereby certify that George E. Kirk and Rebecca Jane Kirk, parties grantors to the foregoing and annexed deed of indenture, purporting to be a deed of trust bearing date the ninth day of August, 18 , personally appeared before us in our county aforesaid, the said George E. Kirk and Rebecca Jane, his wife, being both personally well known to us as the persons who executed the said deed, and the said George E. Kirk did acknowledge the same to be his act and deed.

And the said Rebecca J. Kirk, being examined by us privily and apart from her husband, and having the deed aforesaid fully explained to her, she did acknowledge the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under our hands and seals this twelfth day of August, in the year of our Lord eighteen hundred and fifty-three.

[SEAL.] J. H. GODDARD, *J. P.*
[SEAL.] T. C. DONN, *J. P.*

32 This is to certify that the within is a true and verified copy of a deed as recorded J. A. S. 84, folio 149, et seq., one of the land records for the District of Columbia.

S. WOLF, *Recorder.*

WASHINGTON, D. C., *November* 23, 1875.

(Endorsed:) George E. Kirk and wife to Walter Lenox and Henry Naylor, deed of trust, part of lot No. 9 in square No. 437. August 9, 1853.

EXHIBIT B.

Geo. E. Kirk and wife to Clarke & Smith, trustees. Deed of trust. Recorded 12th April, 1856. Liber J. A. S. No. 114, fol. 358.

This indenture, made this twenty-fourth day of March, in the year of our Lord one thousand eight hundred and fifty-six, between George E. Kirk and Rebecca Jane Kirk, his wife, of the city of Washington, in the District of Columbia, of the one part, and Richard H. Clarke and A. Austin Smith, of the same place, of the other part.

Whereas the said George E. Kirk stands indebted unto Hugh Bernard Sweeny, of the said city and District, in the full and just sum of sixteen hundred dollars, for which the said George E. Kirk has made and delivered to the said Hugh Bernard Sweeny his promissory note for the sum of sixteen hundred dollars, bearing even date with these presents and payable two years after date, and the said George E. Kirk being desirous to secure the payment of the said note, and of any and all note or notes, if any, that may be given in renewal or curtailment thereof, and of any and all note or notes, endorsements, discounts, accounts, and other demands, if any, which the said Hugh Bernard Sweeney may hold of or against the said George E. Kirk at any and all times before the execution of this trust as hereinbelow provided for, the said parties of the first part have agreed to execute these presents:

Now, therefore, this indenture witnesseth that the said

33 George E. Kirk and Rebecca Jane Kirk, his wife, for and in consideration of the premises and for the further consideration of five dollars current money to them in hand paid by the said parties of the second part at or before the ensealing and delivery of these presents, the receipt of which is hereby acknowledged, have given, granted, bargained, and sold, aliened, released, enfeoffed, conveyed, and confirmed, and do by these presents give, grant, bargain and sell, alien, release, enfeoff, convey, and confirm to and unto the said Richard H. Clarke and Austin Smith and the survivor of them, his heirs and assigns, forever, all that piece or parcel of land lying and being in said city, and known and distinguished on the ground plan or plat thereof as the west half of lot numbered nine (9), in square numbered four hundred and thirty-seven (437), fronting on south F street sixteen (16) feet, and running back at right angles eighty-six (86) feet four (4) inches.

Together with all and singular the rights, privileges, improvements, buildings, tenements, hereditaments, and appurtenances to the same belonging or in any way appertaining, and the remainders and reversions thereof, and all the right, title, interest, and estate, both at law and in equity, of them, the said George E. and Rebecca Jane Kirk, in and to the same:

And also the following personal property, that is to say, one doz. mahogany chairs, one doz. and a half common wood-bottom chairs, one mahogany rocking-chair, one cane-seat rocking chair, four stoves, one sideboard, two mahogany looking-glasses, one piers-table, and one mahogany centre-table with marble top, one painted centre-table, three washstands, one mahogany workstand, one mahogany candle-stand, two painted wardrobes, four bedsteads, four feather beds and bedding, two mahogany bureaus; two writing-desks, one mahogany and the other painted; one cherry and two mahogany dining tables, one silver tea set; one dozen silver spoons, tea; half dozen silver table-spoons, one passage lamp, oil-cloth, stair carpeting and rods, five carpets, one common and one gilt set of china, one common white dinner set, now in the possession and use of the said Kirk, and being in and about the house and premises occupied by him on Seventh street, between D and E streets south;

34 one tenanty and one sticking machine, two horses and one spring-wagon and harness, and one lot of sash, doors, and blinds, and lumber in the yard and stable attached to the house and premises of the said Kirk, and one planing-mill, wheat-thresher, and horse-power, now at Mr. Baden's store:

To have and to hold the said piece or parcel of land and premises, with the appurtenances, to and unto the said Richard H. Clarke and A. Austin Smith, and the survivor of them, his heirs and assigns, forever, and the said personal property, goods, and chattels to the said Richard H. Clarke and A. Austin Smith, and the survivor of them, his executors, administrators, and assigns, forever.

In trust, nevertheless, for and upon the following uses, trusts, purposes, and intents, and none other whatsoever, that is to say, in trust to suffer and permit the said George E. Kirk to have, hold, use, possess, and enjoy the said piece or parcel of land and premises with the appurtenances and the said personal property, goods, and chattels, until default made in the payment of the said note, or of any note or notes, if any, that may be given in renewal or curtailment thereof, or default made at any time after the expiration of the said two years and before the execution of the trusts herein created in the payment of all or any note or notes, endorsements, discounts, accounts, or other demands as aforesaid; and upon any such default or defaults, and the request, in

writing, of the said Hugh Bernard Sweeny, his executors, administrators, or assigns, the said Richard H. Clarke and A. Austin Smith, or the survivor of them, shall enter upon and take possession of the said piece or parcel of land and premises, with the appurtenances; and the said personal property, goods, and chattels, and the same, at public auction, to the highest bidder or bidders, sell upon such terms and conditions as to them or him shall seem most for the advantage of all the parties interested, having previously given public notice of such sale or sales in one or more newspapers printed and published in said city for at least three weeks before the sale or sales and on the day or days thereof, setting forth the times, places, terms, and conditions thereof, and out of the proceeds of sale, after first paying the proper legal costs and expenses of sale, including a commission of five per centum on the gross proceeds of sale as a compensation to the trustees or trustee for the execution of these trusts, shall be paid to the said Hugh Bernard
35 Sweeny, his executors, administrators, or assigns, the said debt of sixteen hundred dollars current money, or such part or parts of the same as may at the time remain unpaid, together with all legal and proper interest, costs, and charges thereon, and any and all note or notes, endorsements, discounts, accounts, and demands whatsoever held by the said Hugh Bernard Sweeny, his executors, administrators, or assigns, whether the same shall have at that time fallen due or not, together with all legal costs and charges thereon, and the balance, if any, shall be paid over to the said George E. Kirk, his executors, administrators, and assigns.

In testimony whereof the said parties of the first part have hereto set their hands and affixed their seals the day and year first above written.

GEORGE E. KIRK. [SEAL.]
REBECCA J. KIRK. [SEAL.]

Signed, sealed, and delivered in the presence of—
J. H. GODDARD.
Z. K. OFFUTT.

DISTRICT OF COLUMBIA,
Washington County, to wit:

We, J. H. Goddard and Z. K. Offutt, justices of the peace in and for the county aforesaid, in the District aforesaid, do hereby certify that George E. Kirk, a party to a certain deed bearing date on the day of , 1856, and hereto annexed, personally appeared before us, in our county aforesaid, the said George E. Kirk, being personally well known to us as the person who executed the said deed, and acknowledged the same to be his act and deed.

Also, Rebecca Jane Kirk, wife of the said George E. Kirk, and a party to the same deed, personally came before us, in our county aforesaid, the said Rebecca Jane Kirk, being personally well known to us as the person who executed the said deed, and being by us examined privily and apart from her husband, and having the deed aforesaid fully explained to her, she, the said Rebecca Jane Kirk, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and wished not to retract it.

36 Given under our hands and seals the 24th day of March, A. D. 1856.

[SEAL.] J. H. GODDARD, *J. P.*
[SEAL.] Z. K. OFFUTT, *J. P.*

This is to certify that the within is a true and verified copy of a deed as recorded in Liber J. A. S. 114, folio 358 et seq., one of the land records for the District of Columbia.

S. WOLF, *Recorder.*

WASHINGTON, D. C., *November* 23, 1875.

(Endorsed:) George E. Kirk and wife to Richard H. Clarke and A Austin Smith. Deed of trust. West half of lot No. 9, in square No. 437. March 24, 1856.

EXHIBIT C.

Geo. E. Kirk and wife to Charles Stott. Deed. Rec'r'd 26th May, 1856. Liber J. A. S. No. 115, fol. 423.

This indenture, made this the twenty-second (22) day of March, in the year of our Lord one thousand eight hundred and fifty-six (1856), between George E. Kirk and Rebecca Jane, his wife, of the one part, and Charles Stott, of the other part, both of the city of Washington, in the District of Columbia, witnesseth:

That the said George E. Kirk and wife, for and in consideration of the sum of four thousand dollars, current money of the United States, to them in hand paid by the said Charles Stott, the receipt of which they the said George E. Kirk and Rebecca Jane, his wife, hereby acknowledge, have given, granted, bargained, and sold, enfeoffed, conveyed, released, and confirmed, and by these presents doth give, grant, bargain, and sell, enfeoff, convey, release, and confirm unto the said Charles Stott, his heirs and assigns, forever, all those several pieces or parcels of ground lying and being in the city of Washington, in the District of Columbia, the metes and bounds of which are as follows, namely:

37 All that piece or parcel of ground fronting twenty-three feet eight inches (23 feet 8 inches) on Seventh (7th) street west, and running back east one hundred and twenty feet to a fifteen foot alley, containing two thousand eight hundred and thirty-nine (2,839) square feet of ground, more or less, and known and described on the ground plat of said city of Washington as lot numbered seventy-eight (lot No. 78), in square numbered four hundred and sixty-five (square No. 465), as subdivided, and all that piece or parcel of ground, being part of lot numbered 9 (lot No. 9), in square numbered four hundred and thirty-seven (square No. 437), beginning for the same sixty-six feet (66) from the northwest corner of said square, running thence due south eighty-six feet two inches (86 ft. 2 in.), thence east fourteen feet (14 feet), thence north eighty-six feet two inches (86 ft. 2 in.), thence west fourteen feet (14 ft.) to place of beginning; all that piece or parcel of ground known as the west half part of lot numbered eleven (lot 11), in square numbered four hundred and thirty-seven (square No. 437); all that piece or parcel of ground known as lot numbered ten (lot No. 10), in square numbered four hundred and thirty-seven (square No. 437), commencing for the same at the northeast corner of said lot and running thence due west, by and with the line of F street south, nineteen feet four inches (19 feet 4 inches), thence south sixty-six feet two inches (66 ft. 2 in.), thence east nineteen feet four inches (19 ft. 4 in.), thence north by and with the dividing line of said lot and lot numbered eleven (No. 11) in said square, being the same property conveyed by Henry Gray and wife to Major Garnet on the first day of November, 1843, and recorded

March 23, 1844, in liber W. B., No. 107, folios 179, 180, 181, and 182, one of the land records for Washington County, in the District of Columbia, and by said Major Garnet to said George E. Kirk, by his deed, bearing date 12th April, 1854, and also the unexpired leasehold of Richmond L. Holmead (which he acquired by the heirs of the late Thomas Munroe), to thirty-six feet fronting of Seventh street, in square numbered four hundred and thirty-three (square No. 433), upon which there are three tenements, together with the buildings, improvements, rights, privileges, appurtenances, and other hereditaments to the same belonging or in any manner appertaining, and the remainders, reversions, rents,
38 issues, and profits thereof, and all the right, title, interest, and estate, both at law and equity, of him the said Geo. E. Kirk, in and to the same: To have and to hold the said described pieces or parcels of ground and premises with the appurtenances, together with the leasehold, unto him, the said Charles Scott, his heirs and assigns, forever, to his and their sole use, benefit, and behoof, forever; and the said Geo. E. Kirk, for himself, his heirs, executors, and administrators, by these presents covenants, promises, and agrees to and with the said Charles Stott, his heirs and assigns, in manner following, to wit: that he, the said Geo. E. Kirk and his heirs, shall and will warrant and forever defend the said pieces or parcels of ground with the leasehold and the appurtenances hereby bargained and sold unto him, the said Charles Stott, his heirs and assigns, from and against him, the said Geo. E. Kirk, his heirs and assigns, and all persons claiming or who may claim by, under, or through him, them, or any of them, and further that he, the said Geo. E. Kirk and his heirs, shall and will at any and all times hereafter, at the request and cost of the said Charles Stott, his heirs or assigns, make and execute any and every deed of assurance in law for the more sure and effectual conveyance of the said pieces and parcels of ground, with the appurtenances, to the said Charles Stott, his heirs and assigns, that the said Charles Stott, his heirs and assigns, or his or their counsel, learned in the law, shall or may devise, advise, or require.

In testimony whereof the said Geo. E. Kirk and wife hath set their hands and affixed their seals the day and year first hereinbefore written.

G. E. KIRK. [SEAL.]
REBECCA KIRK. [SEAL.]

Signed, sealed, and delivered in presence of—
J. H. GODDARD.
Z. K. OFFUTT.

DISTRICT OF COLUMBIA,
Washington County, to wit:

We, J. H. Goddard and Z. K. Offutt, justices of the peace in and for the District and county aforesaid, do hereby certify that Geo. E. Kirk, a party to a certain deed to Charles Stott, bearing date on the twenty-second day of March, one thousand eight hundred and fifty-six,
39 and hereto annexed, personally appeared before us, in our District and county aforesaid, the said Geo. E. Kirk being personally well known to us as the person who executed the said deed, and acknowledged the same to be his act and deed, and we, justices of the peace, as aforesaid, do further certify that Rebecca Jane Kirk, the wife of the said George E. Kirk, party to the said deed aforesaid and hereto annexed, personally appeared before us in our District and county aforesaid, the said Mrs. Rebecca Jane Kirk being well known to us as the person who executed the said deed, and being by us examined privily and apart from her husband and out of his hearing, and having th

deed aforesaid fully explained to her, she, the said Rebecca Jane Kirk, acknowledged the same to be her act and deed and declared that she had willingly signed, sealed, and delivered the same and that she wished not to retract it. Given under our hands and seals this 24th day of March, 1856.

[SEAL.] J H. GODDARD, *J. P.*
[SEAL.] Z. K. OFFUTT, *J. P.*

(Endorsed:) George E. Kirk and wife to Charles Scott. Deed.

Received 26th of May, 1856, to be recorded and the same day was recorded in liber J. A. S., No. 115, folios 423, 424, 425, 426, and 427, one of the land records for Washington County, in the District of Columbia, and examined by

JNO. A. SMITH,
Clerk.

Summons.

DISTRICT OF COLUMBIA, *to wit:*

The United States of America, to the marshal of the District of Columbia, greeting:

You are hereby commanded to summon George E. Kirk, Walter Lenox, Henry Naylor, Richard H. Clarke, A. A. Smith, Hugh B. Sweeny, John Robinson, Major Garnett, John H. Goddard, jr., Job W. Angus, Charles Stott, and William S. Martin, if they shall be found in the county of Washington, that they be and appear in the circuit court of the District of Columbia, at rules to be held for the county of Washington, at the city of Washington, on the first Monday of January next, to answer to bill of complaint of D. W. Moore, trading under the firm and style of D. W. Moore & Co., filed in court here against them.

Hereof fail not at your peril, and have you then and there this precept.

Witness the Hon. James Dunlop, chief judge of the said court.

Issued the 21st day of November, 1859.

JNO. A. SMITH,
Clerk.

CARRINGTON & LLOYD.

MEMORANDUM.—The defendants to enter their appearance in the suit, on or before the day on which the above subpœna is returnable, otherwise the bill may be taken pro confesso.

(Endorsed:) 1563. Equity to January rules. D. W. Moore & Co. vs. Subp'a, George E. Kirk, Walter Lenox, Henry Naylor, Richard H. Clarke, A. Austin Smith, Hugh B. Sweeny, John Robinson, Major Garnett, John H. Goddard, jr., Job W. Angus, Charles Stott, William S. Martin. Non sunt Major Garnett and William S. Martin. Summoned the others. W. Selden, marshal. November 28, 1859.

Decree.

D. W. MOORE & CO.
vs.
GEORGE E. KIRK AND OTHERS. } No. 1763. Chancery. May term, 1860.

The defendants in this cause, to wit, George E. Kirk, Walter Lenox,

Henry Naylor, Richard H. Clarke, A. Austin Smith, Hugh B. Sweeny, John Robinson, John H. Goddard, jr., Job W. Angus, and Charles Stott, having failed to appear and answer the facts, matters, and things set forth and contained in the bill of complaint of the complainant, and the said bill having been taken pro confesso for want of an appearance and answer at rules against all of the above-named defendants:

It is thereupon this 30th day of May, in the year of our Lord one thousand eight hundred and sixty, ordered, adjudged, and decreed by the court, that the said property in said complainant's bill mentioned, described and referred to, to wit, parts of lots numbered seven (7), nine (9), in square
41 numbered four hundred and thirty-seven (437), lot numbered seventy-eight, in the subdivision of square numbered four hundred and sixty-five (465), all of said property situate, lying, and being in said city of Washington, District of Columbia, with the buildings and improvements thereon (the said property and real estate being particularly set forth and described in said bill of complaint, and the deed therein referred to and exhibited), be sold, or so much thereof as may be necessary, for the payment of said complainant's claim and others who may come in as creditors of the said George E. Kirk, by petition in the manner and form required by law and the practice of the court; and that Edward C. Carrington be, and is hereby, appointed trustee to make such sale; that the said trustee shall first give bond to the United States in the penalty of $2,000, with surety or sureties to be approved by one of the judges of this court, for the faithful performance of his trust.

He shall then give two weeks' notice, by three insertions per week in some newspaper printed and published in the said city of Washington, of the time, place, manner, and terms of sale, and shall sell the same, or so much thereof as may be sufficient, at public auction, in front of the premises, on the following terms, viz, one-third cash; the residue in two instalments of six and twelve months, the purchaser giving his notes for the deferred payments, and bearing interest from the day of sale; the title deed to be retained until the whole of the purchase money is paid. And the said trustee shall, as soon as convenient after said sale or sales, report the same to this court, with an affidavit of the correctness thereof, and of the fairness of such sale or sales, and on the ratification of the same by the court and payment of the purchase money, the said trustee shall, by a good and sufficient deed, duly executed, convey to the purchaser or purchasers, his, her, or their heirs, the property so sold free, clear, and discharged of all claim of the above-named parties to this suit, or of any person or persons claiming by, under, or through them or any of them; and the said trustee shall bring into court the money arising from such sale or sales, and the notes taken for the same to be distributed and disposed of under the direction of this court, after deducting therefrom the costs and expenses of this proceeding.

By order of court.

Test:

JNO. A. SMITH, *Clerk.*

42 (Endorsed:) D. W. Moore & Co. vs. Chancery 1563, George E. Kirk, Walter Lenox, and others. Decree.

Notice of sale and of motion for confirmation.

Circuit court of the District of Columbia.

D. W. MOORE *vs.* GEORGE E. KIRK. } In equity. No. 1563.

The undersigned trustee having reported that, in pursuance of the decree in this cause, he had sold lot numbered seventy-eight (78), in subdivision of square numbered four hundred and sixty-five (465) of the plan of the city of Washington, with the improvements, to Thomas B. Florence, for Lucy E. Norman, for the sum of $1,480, and that the said purchaser had complied with the terms of sale, and had paid $150 to perfect the title to said lot, with the understanding that the same would be allowed by the court in settlement, he hereby, this 27th day of June, A. D. 1862, gives notice that a motion will be made at the ensuing October term of said court, or the first day thereof, for a final ratification of said sale.

E. C. CARRINGTON, *Trustee.*

N. B.—Publish three times a week for three successive weeks.

(Endorsed:) Notice of publication by trustee. Filed 27th June, 1862.

MEMORANDUM.—Due proof of publication of foregoing notice filed.

Report of trustee.

D. W. MOORE & CO. *vs.* GEORGE E. KIRK AND OTHERS. } No. 5363. Equity.

To the hon. the judges of the circuit court of the District of Columbia, in chancery sitting:

43 The report of Edward Carrington, trustee appointed by the decree in this cause, to make sale of certain real estate therein mentioned, shows, that after giving bond, with security approved by the court, for the faithful discharge of his trust, as required by said decree, and giving notice of the time, place, manner, and terms of sale, by advertisement in the Daily National Intelligencer and National Republican for more than two weeks in succession, by three insertions per week before the day of sale (the said Daily National Intelligencer and National Republican being newspapers printed and published in the city of Washington), he did, pursuant to said notice and decree, offer for sale at public auction, in front of the premises, on Friday, the 27th day of December, A. D. 1861, at 4 o'clock p. m., the following property, to wit:

Lot numbered seventy-eight (78), in subdivision of square numbered four hundred and sixty-five (465), of the plan of the city of Washington, with the improvements thereon, consisting of a frame dwelling-house, and sold the same to Thomas B. Florence for Lucy E. Norman, he being then and there the highest bidder therefor, at and for the sum of one thousand four hundred and eighty dollars, and that the said purchaser had complied with the terms of sale, by paying one-third cash and giving her two notes for the residue, bearing interest, as required by said notice and decree, less, however, the amount hereinafter specified. The notes in question are satisfactorily endorsed.

Your trustee further reports that at the time of said decree and sale, in fact prior to the filing of said bill of complaint, the title to said lot of ground was outstanding in one Walter S. Cox, esq., though unknown to your trustee, and that the said sale was made with the understanding that the purchaser was not to be held to his purchase unless the said title was good; that the amount due the said Cox was paid by the said purchaser, to wit, the sum of one hundred and fifty dollars, with the understanding, however, that the same would be allowed her in settlement.

Your trustee, therefore, prays that in view of the fact that the sale so made was a fair sale, and, as he is informed, as much as the property was worth, that the sum so paid by her may be allowed, and that the said sale may be ratified and confirmed. And he files herewith bills for advertising and auctioneering, and prays that the same may be
44 allowed, together with his commissions. He also files herewith copies of the advertisement above referred to.

And your trustee having sold sufficient property to pay and satisfy the claims provided for in said bill and decree, discontinued the sale of the other property mentioned in said proceedings.

All of which is respectfully submitted.

EDWARD C. CARRINGTON,
Trustee.

DISTRICT OF COLUMBIA,
County of Washington, to wit:

On this 25th day of June, A. D. 1862, before the subscriber, a justice of the peace in and for the county of Washington, in the District of Columbia, personally appeared the within named Edward C. Carrington, trustee, and made oath that the matters, facts, and things stated in the foregoing report are true to the best of his knowledge and belief, and that the sale therein reported was fairly made.

Sworn before—

JNO. H. JOHNSON, *J. P.*

By A. Green, auctioneer.

Chancery sale of valuable property on the Island.

By virtue of a decree of the circuit court of the District of Columbia, sitting in chancery, bearing date on the 30th day of May, A. D. 1860, and passed in cause therein depending between D. W. Moore & Co., complainants, and George E. Kirk & others, defendants (No. 1563 chancery), I shall offer for sale at public auction, on Friday, the 27th day of December, A. D. 1861, in front of the premises, at 4 o'clock p. m., to the highest bidder, the following property, to wit: Lot numbered seventy-eight (78), in subdivision of square numbered four hundred and sixty-five (465), and parts of lots numbered seven (7) and nine (9), in square numbered four hundred and thirty-seven (437), of the plan of the city of Washington, the said parts of lots being particularly set forth in the proceedings and exhibits in said cause, to which he refers, with the buildings and improvements on said lot, which consist of a good frame house and parts of vacant lots.

Terms of sale: One-third cash, the residue in two instalments of six and twelve months, the purchaser giving his notes for the deferred
45 payment, bearing interest from the day of sale. The title deeds to be retained until the whole of the purchase money is paid.

All conveyancing at the cost of the purchaser.

EDWARD C. CARRINGTON,
Trustee.

GREEN & WILLIAMS,
Auctioneers.

Dec. 14, 3 taw & ds.

(Endorsed:) 1563. D. W. Moore & Co. vs. Equity, George E. Kirk. Report of sale. Filed 27th June, 1862.

MEMORANDUM.—Due proof of publication of foregoing advertisement filed.

Order of confirmation of trustee's report of sale.

D. W. MOORE & Co.
vs.
GEORGE E. KIRK. } No. 1563. Equity. Oct. term, 1862.

The trustee in this cause having made and filed his report of sale, and no exceptions having been taken thereto, although notice appears to have been given by said trustee as required by the rule, it is this 28th day of October, A. D. 1862, ordered by the court that the said sale so made and reported be, and the same is hereby, finally ratified and confirmed. And the cause is referred to the auditor to take and state the trustee's account and make distribution in the premises.

By order of court.

Test:

JNO. A. SMITH, *Clerk.*

(Endorsed:) 17th November, 11 o'clock. 1563. D. W. Moore & Co. vs. Equity, George E. Kirk et al. Final order of ratification of sale.

Auditor's report, first.

D. W. MOORE & Co.
vs.
GEORGE E. KIRK AND OTHERS. } No. 1563. Equity.

Report upon the trustee's account and the distribution.

46 The complainants filed the bill on the 21st November, 1859, as creditors on four judgments obtained on the 6th August, 1856, before a justice of the peace, and seek the sale of the equitable estate of said Kirk in divers lots in this city, and among them of lot No. 78 in the subdivision of square No. 465.

The other lots named in the bill are No. 7, 9, 10, 11, and 12, in square No. 437, and Nos. 43, 44, 45, and 46, in square No. 465. None of these have been sold but the lot No. 78, in square No. 465, only; and the distribution relates to the proceeds of that lot merely.

The bill states that that lot and others were conveyed on the 22d March, 1856, prior to the date of the complainant's judgments, by said Kirk to Charles Stott in fee; but that such conveyance was voluntary and fraudulent and void against them, and they pray the same may be so declared and the lot sold, and the proceeds applied, first, to any incumbrances thereon, and next, to the satisfaction of their said judgments.

Kirk was returned duly summoned to January rules, 1860, but did

ont appear or answer, and the bill was taken for confessed against him at the rules, and the decree pronounced on the 30th of May, 1860, directed said lot and others to be sold for the payment of the complainant's claim and others who may come in as creditors of said Kirk by petition in the manner and form required by law and the practice of the court.

Prior and subsequently to the date of the decree, a number of creditors of Kirk have filed petitions to be paid their judments and claims against him out of the fund in the trustee's hand, viz: Summers & Co. filed their petition on the 1st March, 1860, on a justice's judgment; Garrett & Co. filed theirs on the same day, on a judgment in this court; White filed his on the 19th December, 1860, on a judgment in this court; Sweeny & Co. on the 16th October, 1862, on a similar judgment, and also on two promissory notes of Kirk; and Dr. Jones his on the 18th November, 1862, on a note; Smith on a note; Keeler on three drafts; Riley on an open account; West and Lusby on note; all filed before the auditor.

None of these claims and claimants are mentioned in the bill. It is filed by Moore & Co. alone, and to establish their own judgments
47 only. It is not for the benefit of themselves and of such other creditors of Kirk as might come in.

The difficulty I feel in respect to allowing any of these other claims is, that Kirk has had no opportunity of being heard in relation to them. The bill is taken for confessed against him; but the confession would be only of the claims stated in the bill, viz, of the complainant's judgments. He could not know that these other claims would be made against him in this suit or on this fund. He might suffer the decree pro confesso as to the complainant's judgments to go against him, because he knew they were right; but he might have defense against the other claims. I think the practice has been, on a bill filed by one creditor alone to establish his own claim merely, and not a general creditors' bill, to require notice to be given to the defendant of the petitions filed by other creditors to be allowed to claim on the fund, and to afford the defendant the opportunity of answering as to the claims stated in the petition.

I gave the annexed notice; but the only creditors named in it are Moore & Co., and Kirk could hardly know from such notice that other creditors had petitioned to have their claims allowed. At the time I prepared such notice I had looked only at the decree, and supposed from the expression contained in it that it was a general creditors' bill.

No notice of publication or other notice having been given by any of these petitioners of these claims, and the defendant Kirk not having been called on to answer as to them, I have not admitted them as claims on the fund, but have left the balance in the trustee's hand to await any action it may be deemed proper to take.

The trustee having stated in his report that there was a prior incumbrance on the lot sold, and that $150 had been paid to W. S. Cox, the incumbrancer, out of the purchase money, and the court having ratified the sale, I have understood the ratification as an approval of the payment, and have allowed that sum out of the fund.

The trustee further states that attachments have been issud by the following named creditors, viz, Thomas E. Baden, West & Lusby, and James J. Fowler, and laid in his hands as garnishee, to bind the fund and subject it to condemnation. This was irregular; the funds being in the hands of the trustee of the court, and virtually in the

48 custody of the court, is not liable to attachment. 4 Md. C. Dec., 412; 2 Md. R., 1, 457. I have not allowed such claims. No judgments had been obtained on these attachments.

The trustee's account is stated in schedule K. The purchase money is $1,480, his disbursements $320, the complainant's debts $195.35, and the surplus in the trustee's hands or to accrue $1,008.52.

W. REDIN,
Auditor.

November 24, 1862.

Circuit court of the District of Columbia.

D. W. MOORE & Co.
vs.
GEORGE E. KIRK AND OTHERS.

The parties to the above suit, the trustee, and the creditors of said Kirk, are notified to attend at my office, City Hall, Washington, on the 17th of November next, at eleven o'clock in the forenoon. The trustee's account will be stated and the fund distributed among the creditors, who will previously file their claims with me.

W. REDIN,
Auditor.

October 31, 3taw 3w

Schedule K.—No. 1563. Equity.

E. Carrington, esq., trustee, Dr.

1861.		
Dec. 27. Purchase money of lot No. 78, in subdivision of square 465, sold to Thomas B. Florence, for Lucy E. Norman, at		$1,480 00
Cash portion, one-third		493 33
Cr.	Payments.	
To W. S. Cox, prior incumbrancer	$150 00	
Auctioneer and advertising	21 93	
Taxed costs, per clerk's certificate	44 25	
Publishing notice of ratification	6 25	
49 Trustee's commission	75 72	
Auditor	*18 60	
Advertising	*3 75	
		$320 50
Balance of cash payment		17 837
Deferred payments		986 26
Interest thereon to accrue		44 37
For distribution		1,203 87
Creditors, Moore & Co:		
Judgment Exhibit A	30 80	
Int. 24th March, 1856, to 28th October, 1862	11 85	

* Paid by trustee, W. R.

Costs	3 08		
		44 73	
Judg't Ex. B, the same		44 73	
Judgment Exhibit C	40 28		
Interest April 18, 1856	15 60		
Costs	3 08		
		58 96	
Judgment, Exhibit D	31 19		
Interest Jan. 17, 1856	12 66		
Costs	3 08		
		46 93	
			195 35
Bal. in the trustee's hands			$1,008 52

(Endorsed:) 1563. Equity. Moore & Co. vs. Kirk and others. Auditor's report, 1st. Filed November 25, 1862.

Affidavit of non-residence.

Personally appeared before the subscriber, Asbury Lloyd, this day of November, A. D. 1863, and made oath in due form of law that George E. Kirk is not a resident of the District of Columbia, and doth not reside therein.

Sworn and subscribed before me this 14th day November, 1863.

R. J. MEIGS, *Clerk, &c.*,
By R. J. MEIGS, JR., *D. C.*

[Stamp.]

(Endorsed:) 1563. Equity. More & Co. vs. 1563. Equity,
50 George E. Kirk et al. Affidavit. Filed November 14, 1863.

Order of publication.

MOORE & CO.
vs.
GEORGE E. KIRK. } No. 1563. Equity.

Supreme court of the District of Columbia.

In the above cause the following petitions have been filed, to be paid certain judgments and claims against the defendant George E. Kirk, viz: Summers & Co., Garrett & Co., Samuel White, Sweeny & Co., William Jones, J. L. Smith, Kessam & Keeler, Riley & Bro., West & Lusby, Thomas E. Baden, James J. Fowler and Henry, Shuthers & Co., all of whom claim to be creditors of said Kirk by virtue of certain judgments, notes, &c., as by reference to the said petitions and claims for amounts and dates will more fully appear; and whereas it appears that the said Kirk is not a resident of the District of Columbia, but is living beyond the jurisdiction of this court, it is therefore, this 14th day of November, A. D. 1863, ordered that notice of the character and object of said petitions be given to the said defendant by publication in the National Intelligencer of a copy of this order once a week for six weeks warning the said defendant Kirk to appear in person or by solicitor, on or before the second Tuesday of January, A. D. 1864, at rules to be held

in the clerk's office of this court, or otherwise the said petitions and claims will be taken as confessed against him.

ANDREW WYLIE,
Justice Supreme Court, D. C.

(Endorsed:) 1563. Equity. Moore & Co. vs. Equity, 1563, George E. Kirk et al. Order of publication. Filed Nov. 14, 1863. Ent'd Ord. B'k, p. 31.

MEMORANDUM.—Due proof of publication of foregoing order of publication filed January 23, 1864.

51 *Order pro confesso.*

MOORE & CO. *vs.* KIRK AND OTHERS. } 1563. Equity.

It appearing to the clerk that the defendants George E. Kirk, Walter Lenox, Henry Naylor, R. H. Clarke, A. A. Smith, H. B. Sweeny, John Robinson, J. H. Goddard, jr., Job W. Angus, and C. Stott have failed to appear and answer in this suit, it is, this second day of February, 1864, on motion of A. Lloyd (by Fred. H. Norton), solicitor for complainants, ordered by the clerk that the bill and the matters thereof be taken for confessed against the above defendants.

Order of reference.

Supreme court of the District of Columbia.

MOORE & CO. *vs.* KIRK ET AL. } No. 1563. Equity.

The petitions and claims filed in the above cause against the said defendant Kirk having been taken as confessed at rules, it is, this 12th day of February, A. D. 1864, ordered by the court that this cause and said petitions and claims be referred to the auditor of this court, with instructions to state the trustee's account and make distribution of the balance of the fund in the hands of the trustee.

By order of the court.

(Endorsed:) 1563. Equity. Moore & Co. vs. Equity, Kirk et al. Order of reference to auditor. February 12, 1864, docketed. Recorded in Eq. min. 1, p. 134, 2 fol.

Auditor's report, second.

D. W. MOORE & CO. *vs.* GEORGE E. KIRK. } No. 1563. Equity.

Further report upon the distribution of the fund in the trustee's hands.

52 The bill was filed to establish the complainant's individual claim against the interest of the defendant Kirk in a number of lots in

Washington, including lot No. 78, in square No. 465, subdivision. The interest which the defendant held in all the lots was an equitable one, the legal title to said lot No. 78 being vested in W. S. Cox, and the equitable title having been conveyed by deed, dated the 22d May, 1856, to the defendant Charles Stott, in trust for the wife and children of Kirk, which deed was sought to be set aside as fraudulent. It was set aside, and the premises were decreed to be sold, and produced more than sufficient to pay the complainant's claim, a surplus of $1,008 remaining in the trustee's hands.

In this stage of the case, a number of other creditors of Kirk filed their claims with me on the former audit; some of them by judgment (as Sweeny & Co., Garrett & Co., S. White, Summers & Prender, and Shulhers & Co.) subsequent to the date of the said deed, and others (as Jones, West & Lusby, Smith, Kissam & Keeler, Riley & Bro., Baden and Fowler) by simple contracts upon notes and open accounts.

I did not on that occasion allow these claims, because the defendant Kirk might have defences, and he had had no opportunity of being heard in regard to them, and had not admitted their justice. his confession, through the order of publication, extending no further than to the complainant's claim, which was the only one mentioned in the bill, and the order of publication. I required that the defendant should be brought in by subpœna, or that publication should be made against him as to these claims.

Publication was made by the order of the 14th November, 1863, and I am now directed by the order of the 12th February, 1864, to state the proper distribution of the remnant of the fund in the trustee's hands among the same claimants. Kirk has not appeared.

The amount is $1,008.52, and the assets whence it arose were equitable assets, and could be reached only by the aid of the court in the exercise of its chancery powers; and the old question again arises, which has so frequently occurred in the old court, viz, as to the proper distribution of equitable assets.

53 The rule of the late circuit court, prior to 1845, is stated by Judge Cranch, in Law vs. Law (3 Cr. C. C. Rep., 324, following 1 Sto. Eq., s. 554), viz, that if equity had to be invoked, as equality was equity, the distribution of assets which could be reached only in that court, should (subject to specific liens by deed and charges in rem) be equal among all the creditors, judgment as well as simple contract, without preference or priority.

But in 1845, in Scott vs. Lynch (not reported) the rule was changed, and it was then held that equitable assets were to be distributed the same as legal assets, viz: first, the specific liens by deed and in rem, and then among the subsequent judgment creditors, not pari passu, but according to the priority of date of their respective judgments. No question arose in that case between such judgment creditors and simple contract creditors; but among judgment creditors and a creditor by deed subsequent in date to them.

This continued to be the rule in the old court to the time of its termination; but it was sustained always by a divided court. Merrick, J., holding that the distribution of equitable assets should be pro rata among all creditors by judgment and subsequent deed. Morsell, J., contra, according to priority of date; and Chief Justice Dunlop always doubting upon the point, but going with his elder brother, Judge Morsell.

And following this rule of the majority of the court I have excluded claims an ounting to thousands and thousands of dollars, which, accord-

ing to my view, were just as much entitled to participate in the funds as those that were admitted and allowed.

I have also followed the rule of the old court in several cases since the organization of the new court, deeming the law of this District fixed by the decisions of the former until reversed; not, however, without stating the doubt; but no exceptions have been taken in any of those cases to bring it up for review by the court.

In the present case the assets are equitable, and are insufficient to pay the judgments in full, of which there are five, the four earliest amounting to $788.76, the fifth to $335.35, the assets to 930.02; and, paying the four in full, the sum of $141.26 only would remain for the fifth judgment and nothing for the simple contract creditors.

The simple contract creditors claim to participate equally with
54 the creditors by judgment in these equitable assets. The early decisions of the old court would have let them in to an equal participation pro rata. So it would be if the rule as stated by Judge Story in the section cited above were followed. But the rule of the old court as laid down in Lynch vs. Scott, giving preference according to dignity and priority of date, would exclude them, as there is not sufficient to pay the judgments in full.

And in that the Supreme Court seems to sustain the late court by its decisions in Day vs. Washburn, 24 How., 352, in 1860. In that case the assets were equitable, and there were no judgments, but all the creditors were simple contract creditors, and the distribution was rateable among them.

But Judge Nelson, in delivering the opinion of the court, states that if any of the simple contract creditors had reduced their claims to judgments at law, and issued executions, they would thereby have obtained a preference in the distribution of the assets over the other simple contract creditors who had not so proceeded.

The rule, therefore, must be considered to be now settled by this decision, as between judgment and simple contract creditors, in the distribution of equitable assets, that the latter can take nothing until the former are paid in full.

But the rule as between the judgment creditors themselves seems still open, viz: whether, where the fund is insufficient (as in this case) to pay them in full, they shall take preferences among themselves according to the date of their respective judgments, or pro rata? The early rule of the old court was, pro rata. So it is as stated by Judge Story. But the latter rule of the late court was, preference according to date. Nothing is said by Judge Nelson on this point in Day vs. Washburn. Our own testamentary act of '98, in providing for the distribution of personal assets, (1798, c. 101, sub. chap. 8, s. 17) directs judgments in the lifetime of the testator or intestate to be paid in full in preference to the simple contract and specialty debts; and, if the personal assets be insufficient to pay such judgments in full, it further directs a rateable distribution among them.

Why should not the same equitable principle be applied to real assets of an equitable character? The personal estate, distributed by
55 virtue of the statute, is legal assets, and can be reached at law through an action at law against the executor or administrator, and without any necessity for resorting to a court of equity, though it may be done; and, though in the distribution of legal assets, and the enforcement of charges in rem, equity follows the rules of law, yet, the general principle of equity in regard to equitable assets is, that it favors equality; and as there is nothing to oppose that principle, except the

decisions of the late court since 1845, (which a majority of the bar as then constituted thought wrong), I have determined in this case to follow the principle of equality and the analogy furnished by our testamentary statute as to the distribution of personal property, and to distribute these equitable real assets pro rata among the judgment creditors, and not according to the date of the judgments.

Since the preceding was written I have *not* with a section of a Maryland statute (which seems to have escaped our attention in the previous discussions of this subject), and which appears to settle the principle according to the view I have expressed above. The act of 1785, c. 80, s. 7, directs the distribution of personal property, first, among judgment creditors in full, and if the assets be insufficient, then pro rata; and if the real estate had to be resorted to, the distribution was to be the same.

And I have so made the distribution in this case for the purpose of bringing again into review, by the present as I did twice by the late court, a rule which always appeared to me to be erroneous. Property in this city is so shingled over with specific liens that the question arises in almost every case of death and distribution of the proceeds of real property. The interest of this community requires that the question should be settled upon the true principle; and the present is as fair a case in which to settle it as any that can arise. The amount involved either way is small, and in order to avoid delay and the cost of a re-audit, I have stated the distribution both ways: A, shows the result between the judgment creditors pro rata; B, the alternative, according to priority of date.

I have included the claim of Summers and Prender among the judgments. It is a judgment recovered before a magistrate. Such judgments, by the terms of our act extending the jurisdiction of
56 justices, are not liens upon real estate except from the time of execution levied. It was the only judgment the plaintiffs could obtain, the debt being less than fifty dollars. No execution upon it any more than on a judgment of this or the circuit court could be levied on Kirk's interest in the lot in question, because it was equitable; but an execution was issued and returned nulla bona, which should be taken to place it upon an equality with the judgments obtained in the circuit court.

The claim of the simple contract creditors to participate with the judgment creditors in the assets is rejected, and the fund is distributed among all the judgment creditors rateably, yielding them a dividend of 82.7 per centum on their claims.

The claims of the simple contract creditors amount to $1,569.31. There is other property mentioned in the decree which has not been sold by the trustee, and other property mentioned in the bill which has not been decreed to be sold.

The simple contract debts have been proved, except Riley & Bro., and Dr. Jones.

Due notice was given to all the creditors, or their attorneys, and the following gentlemen attended the audit: Messrs. Lloyd, Ennis and Mattingly.

February 29, 1864.

W. REDIN, *Auditor.*

A.

Debit.

Balance for distribution in the trustee's hands on the former audit	$1,008 52

Credit.

Allowances: Taxes to be paid by trustee in redemption of lot from tax-sale	$28 15	
Further fees to clerk from tax-sale	8 20	
Publishing order of publication	10 50	
Auditor's fees and notice	31 65	
		78 50
		$930 02

Dr.

Distribution 82.7 per cent.

57	Debt.	Dividend.
Sweeny & Co., amount of judgment	151 19	125 27
Garrett & Co., amount of judgment	483 95	401 26
S. White, amount of judgment	95 16	78 76
Summers & Prender, amount of judgment	58 46	48 99
Shulhers & Co., amount of judgment	335 35	275 70
	1,124 11	929 98
Fractions		04
		930 02

Feb. 29, 1864.

W. REDIN, *Auditor.*

B.

Debit.

Final balance for distribution	$930 02
To Sweeny & Co	151 19
	778 83
" Garrett & Co	483 95
	294 88
" S. White	95 16
	199 72
" Summers & Prender	58 46
" Shulhers & Co., the residue	141 26

W. REDIN, *Auditor.*

Simple contract creditors whose debts have been proved.

1. West and Lusby, three notes	554 08
2. John L. Smith, draft	225 00
3. T. E. Baden, note	117 63
4. S. Fowler, "	218 16
5. Dr. Jones, "	59 50
6. Kissam & Keeler, note	305 60
6. Riley & Bro., "	89 34
	1,569 31

58 (Endorsed:) 1,563. Equity. Moore & Co. vs. Kirk and others. 2d report of auditor. Filed February 29, 1064. R. J. M., clerk.

Order confirming auditor's 2d report.

Supreme court of the District of Columbia.

D. W. MOORE & Co.
vs.
GEORGE E. KIRK AND OTHERS. } No. 1563. Chancery.

The auditor having made and filed his report on the distribution of the proceeds of sale in the hands of the trustee (E. C. Carrington), and no exceptions having been taken to the same, it is, this 9th day of April, A. D. 1864, ordered by the court that the said report be and the same is hereby ratified and confirmed, and the said trustee will distribute accordingly.

A. B. OLIN, *Justice.*

(Endorsed:) 1563. Equity. Moore & Co. vs. Kirk et al. Order ratifying auditor's report, April 9, 1864. Recorded Eq. min., 1 p., 1 fol. and docketed.

Trustee's advertisement of second sale.

By Wm. L. Wall & Co., auctioneers.

Sale of improved property on the Island.

By virtue of a decree of the late circuit court of the District of Columbia, bearing date on the 30th of May, A. D. 1860, and passed in a cause in which D. W. Moore & Co. are complainants and George E. Kirk and others are defendants, I shall offer for sale at public auction, in front of the premises, on Thursday the 14th of April, 1864, at 5 o'clock, parts lots of ground numbered four hundred and thirty-seven (437) of the plan of the city of Washington, as described in the proceedings in the said cause (the dimensions of which will be given on the day of sale), with the improvements thereon, consisting of a neat and substantial two-story brick house.

59 This property is situated on F street south, between 7th and 8th streets west, in a thriving and healthy neighborhood.

Terms: one-third cash, the residue in two instalments of six and twelve months, the purchaser giving his notes for the deferred payments, bearing interest from the day of sale. The deed to be retained until the whole of the purchase-money is paid. All conveyancing at the cost of the purchaser.

EDWARD C. CARRINGTON, *Trustee.*
W. L. WALL & CO., *Auctioneer.*

Int. 30 so2w.

Trustee's second report.

D. W. MOORE & Co.
vs.
GEO. E. KIRK ET AL. } No. 1563. Equity.

To the hon. the judges of the supreme court of the District of Columbia, in equity sitting:

The second report of Edward C. Carrington, trustee, appointed by the

decree in this cause bearing date the 30th May, A. D. 1860, to make sale of certain real estate therein mentioned and decreed to be sold, to wit: being parts of lots numbered seven (7) and nine (9) in square numbered four hundred and thirty-seven (437) and lot numbered seventy-eight (78) in the subdivision of square numbered four hundred and sixty-five (465), all of said property situate, lying and being in the city of Washington, in the District of Columbia, together with the improvements thereon; respectfully shows, that in pursuance of said decree and after complying with the requirements thereof, giving due notice as required by publication in the National Intelligencer and Evening Star, two newspapers printed and published in the city of Washington, of the time, place, manner and terms of sale, he did expose for sale, at public auction, through Messrs. Wall & Co., auctioneers, on the 19th day of April, A. D. 1864, in front of the premises, being a postponement from the 14th April, in order to procure a plat of said ground, the said parts of lots numbered seven (7) and nine (9) in square numbered four hundred and thirty-
60 seven (437), as described in the proceedings in this cause (lot numbered seventy-eight (78) in subdivision of square numbered four hundred and sixty-five (465) having previously been sold, as by reference to your trustee's first report will appear), together with the improvements thereon, consisting of a small two-story brick house, and sold the same to Hamilton at and for the sum of nine hundred and fifty dollars ($950), he being then and there the highest bidder for the same. He further reports that the said purchaser has fully complied with the terms of sale by paying one-third cash and giving his two notes for the deferred payments payable to the order of your trustee in six and twelve months after date and bearing interest from the day of sale, said cash payment being three hundred and sixteen dollars and sixty-six cents, and the aggregate amount of said notes being six hundred and thirty-three dollars and thirty-two cents.

And your trustee files herewith a certified copy of said advertisements, also the plat above referred to, and prays that the same may be read and considered as a part of this his report. All of which is respectfully submitted.

EDWARD C. CARRINGTON, *Trustee.*

DISTRICT OF COLUMBIA,
County of Washington, sct:

On this 9th day of November, in the year of our Lord one thousand eight hundred and sixty-four, before me, the subscriber, a justice of the peace in and for said District, personally appeared Edward C. Carrington and made oath in due form of law that the matters, facts and things in the above and annexed report stated are true according to the best of his knowledge, information and belief, and that the said sale was fairly made.

[SEAL.] JNO. H. JOHNSON, *J. P.*

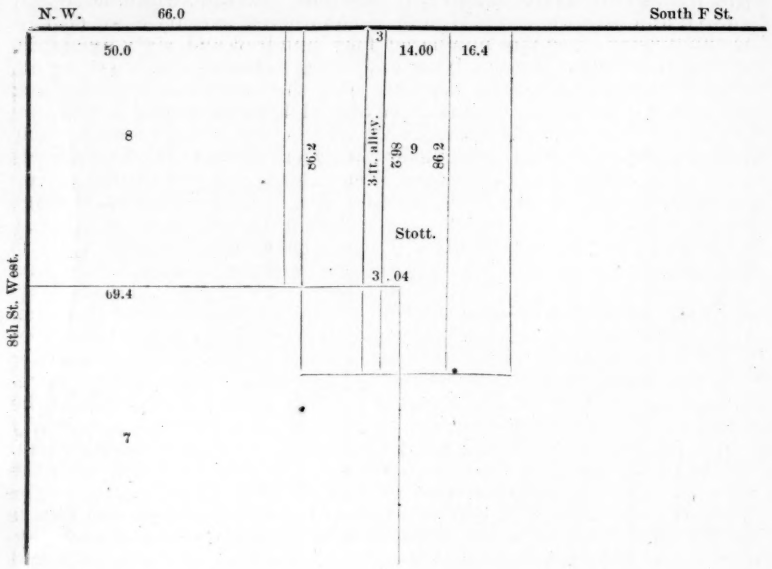
(Endorsed:) 1563. Equity. Moore et al. vs. Kirk et al. Second report of sale by E. C. Carrington, trustee. Filed November 10, 1864. R. J. M., clerk.

61 *Plat of part of lots 7 and 9, square 437.*

SURVEYOR'S OFFICE,
Washington, D. C., 18th April, 1864.

I hereby certify that I have surveyed and marked for Mr. Carrington

trustee, lot No. 9, in square No. 437, as per plat in this office, and the annexed diagram.



WM. FORSYTH,
Surveyor of the City of Washington.

Fee, $2.50. Paid.

(Endorsed:) 19, 1563, Eq. W. R. Surveyor.

62 *Order of confirmation nisi.*

In the supreme court of the District of Columbia.

MOORE ET AL. *vs.* KIRK ET AL. } No. 1563. Equity.

The trustee (E. C. Carrington) having reported that under the decree dated May 30th, 1860, passed in the above cause, he sold, on the 19th April, 1864, parts of lots numbered seven (7) and nine (9), in square No. 437, with the improvements, as described in said proceedings, to Hamilton, for the sum of $950, and that the said purchaser had complied with the terms of sale: It is by the court, this 10th day of November, A. D. 1864, ordered that the said sale be ratified and confirmed unless cause to the contrary be shown on or before the first Tuesday in December, 1864; provided, however, that publication be made of this order at least three times a week for three weeks before said day, in some newspaper printed in the city of Washington.

By order of the court.

(Endorsed:) 1563. Moore & Co. vs. Equity, Kirk et al. Order nisi. Filed November 10, 1864.

MEMORANDUM.—Due proof of publication of foregoing order nisi filed.

Order of confirmation and of reference.

In the supreme court of the District of Columbia.

MOORE ET AL. *vs.* KIRK ET AL. } No. 1563. Equity.

The trustee in this cause having made and filed his report of sale, in pursuance of the decree in this cause, and no exceptions having been taken to the same, although notice appears to have been given in accordance with the terms of the order nisi heretofore granted, and the said report having been duly considered by the court:

63 It is, therefore, this 12th day of December, A. D. 1864, by the court ordered, adjudged, and decreed that the said sale so made and reported be, and the same is hereby, finally ratified and confirmed, and the cause is referred to the auditor to state the accounts of the trustee in the premises, and to state the distribution.

By order of the court.

(Endorsed:) No. 1563. Equity. Moore et al. vs. Kirk et al. Order of ratification of second sale and reference to the auditor. Filed December 12, 1864. R. J. M., clerk.

Auditor's report, third.

MOORE & CO. *vs.* KIRK AND OTHERS. } No. 1563. Equity.

Further report upon the additional sale made by the trustee in the above cause, and upon the distribution of the fund arising therefrom.

The complainants were creditors of George E. Kirk upon four justices' judgments, and filed their bill for the sale of his equitable interest in lot No. 78, in square No. 465, and lots Nos. 7 and 9, in square No. 437, and other lots in that and other squares, for payment of their own judgments only.

The bill was taken for confessed against Kirk, and the decree was pronounced on the 30th May, 1860, directing lots 78 and 7 and 9, in said squares, only, or as much as might be necessary, to be sold, and to be sold for the benefit of all creditors of Kirk who should come in.

The trustee sold on the 27th December, 1861, lot 78 only, which produced more than sufficient to pay the complainant's judgments and left a surplus of $1,008.50 in his hands.

A number of creditors of Kirk, by judgment as well as simple contract, had filed their petitions, some before and others after the decree, to be paid their claims; but the bill having been taken for confessed on the judgments of the complainants alone, and, in November, 1862, when the trustee's account of the sale of lot 78 was stated, Kirk being then among the Confederates and having had no notice that his

64 other creditors were claiming on this fund, the court directed the notice of the 14th of November, 1863, to be given to Kirk of such claims.

That notice was published, and no appearance or answer having been made, the cause was again referred to me in February, 1864, to distribute the said surplus.

Under such notice a number of other simple contract creditors of Kirk had filed their claims. But the fund being insufficient to pay even the judgments in full, following the opinion of the Supreme Court, as intimated in Day vs. Washburne, 24 How., 352 (a similar case of distribution of equitable assets), I excluded the simple contract creditors, and confined the distribution to such as had obtained judgments; and the fund being equitable assets and insufficient to pay the judgments, I distributed it among the judgment creditors pari passu, and not according to priority of date, for the reasons stated in the report of 29th of February, 1864, to which I beg leave respectfully to refer.

The creditors who then participated were Sweeney & Co., and Summers & Co., on judgments obtained in 1856, and filed in this cause the 1st March, 1860, and 16th October, 1862; Garrett & Co., in 1857, filed 1st March, 1860; White, in 1859, filed December 10, 1860; Shulhers & Co., on a judgment obtained January, 1862, in a suit brought October, 1861, and filed in 1863, before the second sale. The amount of the judgments filed in November, 1862, the time of the first audit, was $788.76; an additional judgment (Shulhers & Co.) was filed before the second sale, bringing the amount of the judgments, at the time of the second audit in February 7, 1864, up to $1,124.11, and the net assets then being $930.02; yielding to these creditors a dividend of 82.7 per cent. on their judgments, and leaving 17.3 per cent. due on each judgment still to be provided for.

This being so, the trustee, on the 19th April, 1864, sold the other two lots, No. 7 and 9, in square 437, which, on the 30th of May, 1860, had been decreed to be sold, and which produced $950; and it is this fund which I am now directed by the order of the 12th December, 1864, to distribute.

I gave the following notice:

65 Supreme court of the District of Columbia.

MOORE AND OTHER CREDITORS
vs.
GEORGE E. KIRK. } No. 1563. Equity.

The parties, the creditors of said Kirk, and E. C. Carrington, trustee, are notified hereby that on the 24th of December, instant, at 11 o'clock in the forenoon, at my office in the city-hall, Washington, I shall state the trustee's account, when and where they are requested to attend, and any creditors of said Kirk who have not filed their claims are required to do so on or before said day.

W. REDIN,
Auditor.

Dec. 13, eod.

A' under this notice several other creditors of Kirk presented their claims, viz: Moore & Co., Murray & Semmes, Wilson, Prentice, and J. Van Riswick; and Kirk having had no notice of these new claims, the court directed a notice similar to that which had been before given, to

be given of the petitions of these creditors, to be let in on the fund. It is annexed.

Supreme court of the District of Columbia.

MOORE & Co.
vs.
GEORGE E. KIRK ET AL. } No. 1563. Equity.

In the above cause the following petitions have been filed to be paid, certain judgments and claims against the defendant, Geo. E. Kirk, viz: D. W. Moore & Co., Murray and Semmes, J. B. Wilson, S. S. Prentice, and John Van Riswick, all of whom claim to be creditors of said Kirk by virtue of certain judgments, notes, etc., as by reference to the said petitions and claims for amounts and dates will more fully appear, and whereas it appears that the said Kirk is not a resident of the District of Columbia, but is living beyond the jurisdiction of this court, it is therefore, this 21st day of December, A. D. 1864, ordered that notice of the character and object of said petitions be given to the said defendant by publication in the National Intelligencer of a copy of this order once a week for six weeks, warning the said defendant, Kirk, to ap-
66 pear in person, or by solicitor, on or before the first Tuesday in March, A. D. 1865, at rules to be held in the clerk's office of this court, or otherwise the said petitions and claims will be taken as confessed against him.

GEO. P. FISHER,
Jus. S. C., D. C.

(Endorsed:) Moore & Co. vs. 1563. Equity. Geo. E. Kirk et al. Order of publication against Kirk. Filed December 31, 1864. R. J. Meigs, clerk.

The claims of Murray & Semmes, Wilson & Prentice, are simple contract debts. Moore & Co. is another justice's judgment, affirmed by the circuit court on appeal, and Van Riswick's is on two judgments of condemnation of these two lots No. 7 and 9 in square 437, on attachments issued against Kirk as an absent debtor.

Van Riswick's debts were originally simple contract debts, one upon promissory notes, and the other on open accounts. The attachments were issued the 16th and 17th of January, 1862, and the judgments of condemnation obtained the 28th and 31st of May, 1862. No execution at law was issued thereon, and nothing further done therein until the 24th of December, 1864, when short copies of these judgments were filed in this cause, and a claim made for the whole proceeds of sale of these lots 7 and 9 to the exclusion of all other creditors. The decree in this cause, authorizing the sale of these lots, is dated the 30th of May, 1860. The trustee sold them, in virtue of the decree, on the 19th of April, 1864.

Pending this last reference of December, 1864, and before the case was considered, Kirk returned from the South and has appeared by Mr. Laskey, his counsel, upon this reference.

The simple contract debts are not admitted by him, but he states that he has offsets in bar against some if not all of them.

Further, considering Van Riswick's claim as a judgment equal to the others, the funds from both sales are insufficient to pay the judgments in full, the amount of all the judgments being $2,233.89, and of the net aggregate of both sales $1,864.63.

In regard then to the simple contract debts, the conclusion to which I have come is, that they will have to be excluded on both
67 grounds: 1. Because of the doubt whether I have the authority to try and pass upon such claims between these parties—it not being the case of a decedent's estate, but both parties, debtor, and creditor, being alien, the ordinary tribunals open, and the claims not reduced to judgments, and not even admitted; and 2. Because the funds are not sufficient to pay in full the claims upon which judgments have been recovered, which, according to Day vs. Washburn, 24 How., have a preference over simple contract creditors in the distribution of equitable as well as of legal assets.

The question then recurs as to the judgments, and the mode in which the deficient equitable fund is to be distributed among the judgment creditors themselves—whether pari passu, or in preference?

Mr. Van Riswick claims the whole of the proceeds of the sale of these lots 7 and 9, to the exclusion of the other judgment creditors, on the ground of his judgments of condemnation. I do not allow it, but admit him to claim equally with the other judgment creditors pro rata upon the fund.

The lots 78 and 7 and 9 had been conveyed by Kirk to secure certain debts. His interest therein, and the assets accruing from the sales, are all equitable; and the proceeds of the first sale of lot 78, were on the second audit distributed pro rata among all the judgments then presented. Van Riswick could not attach these equitable assets in the hands of the trustee of the court, because under its protection, and subject to its disposition (Bently vs. Shreeve, 4 Md. Ch. Dec., 412, Beetson's case 7 G. & Jo., 421. 2 Md. Rep., 1457). An ejectment will not be permitted against a sequestrator or receiver in possession without the leave of the court. In Angel vs. Smith, 9 Vez., 335, it was permitted under the special circumstances of the case; but as a general rule, where the court has taken the property under its control, it will not suffer its jurisdiction to be disturbed. It is, therefore, I think, at least doubtful whether after this court had set aside the deeds and taken these lots into its hands for disposition, and had, in fact, two years before the date of these judgments of condemnation, decreed them to be sold for the benefit of all creditors who had and might come in, (Van Riswick as well as others)—he could, in the face of such prior decree, have
68 issued an execution at law upon his subsequent judgments, taken these lots, and thus intercepted the disposition which the court assumed, and had, in fact, as vendor, directed to be made; or could have done more than come into this court and shown the necessity for a sale, or to coerce, if necessary, the trustee to sell under the decree—a question which Mr. Phillips in the notes submitted by him, has put forcibly and ingenuously, but which I think I may pass, since, however, the question of right might be at law, Van Riswick did not, in fact, avail himself of it; he did not issue an execution on his judgments, but suffered them to stand, and these lots to be sold under the decree, and this equitable fund to be brought into court by the trustee for distribution, and he then (Dec. 1864) comes into equity, files short copies of his judgments, and seeks the aid of the court to have the proceeds of these lots 7 and 9—(peculiarly equitable assets)—applied in payment of his judgment to the exclusion of all others. He is, it seems to me, at once met here by the rule that he who seeks equity, or to be paid out of an equitable fund, must do equity; which in the distribution of equitable assets, is equality, and the right merely to share pro rata with all other claims of equal dignity. I incline to the opinion that Van Riswick,

having reduced his simple contract claims into judgments, has, by superior diligence, obtained an advantage over the other simple contract creditors, (independent of Kirk's objection to those claims,) that his judgments are equal, but not superior to the others; that they established his right, as between himself and Kirk and the other judgment creditors, to come into equity, and share equally with them in the distribution of these equitable assets; and that the proceeds of both sales should form one mass, and be distributed pari passu among all of them, but I do not think he is entitled to the preference he claims over the other judgment creditors, and rule against it.

I have, therefore, in the first place, given Mr. Van Riswick, out of the proceeds of sales of these lots 7 and 9, the same dividend of 82.7 per cent. which the other judgment creditors have received out of similar assets from the sale of lot 78, and then distributed the residue equally among all, which, (the simple contract creditors being out of the case,) does, I think, full and exact justice to all the judgment creditors.

69 The judgment of Moore & Co. presented on this audit, and being the fifth of their judgments, has been reduced. On the first audit the only claims that could be noticed were their four justice's judgments which were then allowed in full. Had all the judgments now before me been then presented, those four would have received a dividend only.

Though Moore & Co. initiated the proceedings through which all obtain payment, they are not entitled on that account to any preference over other judgment creditors, but must take pro rata with them in the distribution of equitable assets. This is also ruled in Day vs. Washburn. I have equalized the matter on this audit by allowing them on this last judgment $16.20 instead of 52.61, its amount.

June 8, 1865.

W. REDIN, *Auditor.*

MOORE ET AL. *vs.* KIRK. } 1563. Equity.

The defendant Kirk does not admit the simple contract debts, but contests the same and requires the said claims before they be allowed by the auditor to be established by competent proof.

June 1, 1865.

R. H. LASKEY,
Att'y for Def't.

Trustee's account B, 1.

E. C. Carrington, esq., trustee.

DR.

1864.		
Apr. 19.	Purchase money of lots 9, 7, in sq. 437, Hamilton	950 00
	Interest on the deferred payments.....	28 50

CR.

By his payments and allowances, viz:

Auctioneers and adverts.....	23 00
Surveyor	2 50

	Publishing order to creditors to appear		10 00	
	Publishing order of ratification sale nisi		10 50	
70	Additional costs		9 75	
	Trustee's commission to clerk	9 34		
	Trustee's commission to trustee	46 73		
			56 07	
	Auditor	27 90		
	Advertising	4 67		
			32 57	
				143 89

DR.

Balance for distribution			934 61
Distribution B, 2.			
June 8, 1865.			
		W. REDIN, *Auditor.*	

Distribution B, 2.

Balance for distribution from B, 1			934 61
	Debts.	Div'ds.	
J. & W. Van Riswick	905 00		
To them, 82.7 per cent		754 50	
" 7.5 "		73 05	
		827 55	
Sweeney & Co	151 19		
To them, 7.5 per cent		12 25	
Garrett & Co	483 95		
To them, 7.5		39 00	
S. White	95 16		
To him, 7½ per cent		7 70	
Summers & Prender	58 46		
To them, 7½ per cent		4 70	
Shulhers & Co	335 35		
To them, 7½ per cent		27 20	
Moore & Co	52 61	16 20	
			934 60

June 8, 1865.

W. REDIN, *Auditor.*

71 The deferred payments of the purchase money having matured, I presumed they had been paid; but Mr. Carrington states that he had received only the cash payment $316.66, and states that Mr. Lloyd had received, he thought, the first note of the purchaser and interest. In a subsequent interview with Mr. Lloyd he states that he had received such note, and that he expected in a few days to receive the last note. In the mean time Mr. Carrington should be charged only with two-thirds of said surplus.

June 8, 1865.

W. R.

(Endorsed:) 1563. Equity. Moore & Co. vs. Kirk. 3d report of auditor on distribution. Filed June 10, 1865.

Order of confirmation auditor's third report.

In the supreme court of the District of Columbia, sitting as a court of equity.

MOORE ET AL., COMPLAINANTS,
vs.
KIRK ET AL., DEFENDANTS. } No. 1563. Rules 6.

Whereas the above entitled cause was referred to the auditor for report upon distribution of the proceeds in trustee's hands, and the said auditor having, on the 10th day June, 1865, made and filed his said report, the same being the 3d report in said cause, and whereas more than one month has passed since the said report was filed, and no exceptions having been taken or entered to the same, it is on this 5th day of September, 1865, on motion, ordered, adjudged, and decreed that the said report of the said auditor be, and the same is hereby, finally ratified and confirmed, and it is further hereby ordered and decreed that the trustee in said cause do proceed without delay to distribute the assets in his hands according to and in conformity with said report.

By order of the court.

(Endorsed:) 1563. Kirk vs. Moore et al. Confirmation of auditor's 3d report. Filed September 5, 1865. R. J. M., clerk.

72 D. W. MOORE & Co.
vs.
GEORGE E. KIRK.

Bill and to January (12), N. S. Martin & Garrett and sd. the rest (10.)
1860, March 1.—Petition of Garret, Dyer, and Thomas and on ext. to be made complainants.
1860, March 1.—Petition of T. B. Summers and L. Pender.
" " Rules (5). Bill taken pro confesso vs. all summoned (12.)
1860, May 30.—Bill dismissed as to Garrett and Martin.
" " Decree for sale, trustee's bond.
1860, December 10.—Petition of Samuel White to be complainant.
1862, June 27.—Trustee's report of sale and notice for publication. Copy sent.
1862, October 16.—Petition of Sweeny, Ritteneouse & Co. to be made parties complainant.
1862, October 28.—Final order of ratification of sale and of reference to auditor.
1862, November 25.—Auditor's report.
1863, November 14.—Affidavit, A. Lloyd, attest and stamp.
" " " Order publication filed, entered ord. book p. 31, 3 fol., and certificate and stamps.
1864, January 23.—Proof publication filed.
1864, February 3.—Pro confesso vs. George E. Kirk, Walter Lenox, Henry Naylor, R. H. Clarke, A. A. Smith, H. B. Sweeny, John Robinson, J. H. Goddard, jr., Job W. Angus, and C. Stott. Recorded ord. book 1, p. 43, 2 fols.
1864, February 12.—Reference to the auditor. Recorded equity, min. 1, p. 134, 2 fol.
1864, February 29.—Auditor's 2d report filed.

" April 9.—Auditor's 2d report ratified. Recorded eq. min. 1, p. 173.
1 fols., and filed.
1864, November 10.—Trustee's 2d report of sale filed. Order confirming trustee's 2d report nisi, filed and recorded ord. book 1, p. 3, fols. 45.
1864, December 12.—Proof publication filed.
" " " Order ratification of sale and reference to auditor filed. Recorded eq. min. 1, p. 315.
73 1864, December 31.—Order publication filed. Recorded eq. min. 1, p.
1865, June 10.—Auditor's 3d report on distribution filed.
1865, September 5.—Decree confirming auditor's report filed. Recorded eq. min. 1, p.

(Endorsed:) Copy of docket entries.

74 *Edward C. Carrington, trustee, to Charles O. Hamilton. Deed.*

This indenture, made this fourteenth day of December, in the year of our Lord one thousand eight hundred and sixty-six, between Edward C. Carrington, of the city of Washington, in the District of Columbia, trustee as hereinafter mentioned, party of the first part, and Chas. Otis Hamilton, of the same city and District, party of the second part.

Whereas, by a decree of the circuit court of the District of Columbia, in equity sitting, bearing date on the thirtieth day of May, in the year of our Lord one thousand eight hundred and sixty, and made in a cause then pending in the said court, wherein D. W. Moore et al. were complainants and George E. Kirk et al. were defendants, the above named Edward C. Carrington was appointed a trustee, and authorized and empowered to sell and dispose of at public sale all those pieces or parcels of ground situate, lying, and being in the city of Washington, in the District of Columbia, being parts of lots known and designated as lots numbered seven (7) and nine (9), in square numbered four hundred and thirty-seven (437), of the authentic ground plan or plat of said city of Washington, together with other lots, pieces or parcels of ground therein particularly described, and in pursuance of the said decree the said Edward C. Carrington, as trustee as aforesaid, did, on the nineteenth day of April, in the year of our Lord one thousand eight hundred and sixty-four, after due notice according to said decree, sell and dispose of at public sale to the hereinbefore named Charles Otis Hamilton, the said pieces or parcels of ground, being parts of lots known and designated as lots seven (7) and nine (9), in square numbered four hundred and thirty-seven (437), in said ground plan or plat of said city of Washington, in manner aforesaid decreed to be sold, at and for the sum of nine hundred and fifty dollars ($950) current money.

75 And whereas the said sale, so as aforesaid made by the said Edward C. Carrington, hath been duly ratified by the supreme court of the District of Columbia, in equity sitting, by a decree dated the twelfth day of December, in the year of our Lord one thousand eight hundred and sixty-four, and the purchase money for the said pieces or parcels of ground and premises hath been fully paid and satisfied, and the said Edward C. Carrington, as trustee as aforesaid, is authorized by the said decree to execute a conveyance for the same:

Now, therefore, this indenture witnesseth that the said Edward C. Carrington, in consideration of the above recited premises, and also of the sum of one dollar, current money of the United States, to him in

hand paid by the said Charles Otis Hamilton at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, released, aliened, enfeoffed, conveyed, and consigned, and by these presents doth grant, bargain, sell, release, alien, enfeoff, convey, and confirm unto the said Charles Otis Hamilton, his heirs and assigns forever, all those certain pieces or parcels of ground situate, lying, and being in the city of Washington, in the District of Columbia, and being part of lots known and designated as lots numbered seven (7) and nine (9), in square numbered four hundred and thirty-seven (437), of the authentic ground plan or plat of said city of Washington. Beginning for the said part of lot numbered nine (9) at a point on south F street distant eighty-three (83) feet from the northwest corner of said square numbered four hundred and thirty-seven (437) and running thence south eighty-six (86) feet two (2) inches to the rear of said lot; thence west thirteen (13) feet eight (8) inches; thence north twenty (20) feet; thence west three (3) feet four (4) inches; thence north sixty-six (66) feet two (2) inches to said south F street; and thence east with the line of said south F street seventeen (17) feet to the place of beginning; and beginning for the said part of lot numbered seven (7) at a point on the north line of said lot distant sixty-nine (69) feet four (4) inches from Eighth street west, being the angle formed by the dividing lines between said lot and lot numbered nine (9) according to the plat of the said city, and running thence south twenty (20) feet; thence west three (3) feet four (4) inches; thence north twenty (20)
76 feet; and thence east three (3) feet four (4) inches with the north line of said lot to the place of beginning. To have and to hold the said pieces or parcels of ground above described and premises, with every of the appurtenances, unto the said Charles Otis Hamilton, his heirs and assigns forever, and to his and their only proper use and behoof forever.

In testimony whereof the said Edward C. Carrington, trustee, hath hereunto set his hand and affixed his seal the day and year first hereinbefore written.

EDWARD C. CARRINGTON, [SEAL.]
Trustee.

Signed, sealed, and delivered, having first been duly stamped, in presence of—

J. F. CALLAN.
W. P. LASSELLE.

DISTRICT OF COLUMBIA,
County of Washington, to wit:

I, John F. Callan, a notary public in and for the county and District aforesaid, do hereby certify that Edward C. Carrington, party to a certain deed bearing date on the fourteenth day of December, in the year of our Lord one thousand eight hundred and sixty-six, and hereto annexed, personally appeared before me in my county and district aforesaid, the said Edward C. Carrington, being personally well known to me to be the person who executed the said deed, and acknowledged the same to be his act and deed.

Given under my hand and notarial seal this 15th day of December, A. D. 1866.

[SEAL.] JOHN F. CALLAN,
Notary Public.

(Endorsed:) Edward C. Carrington, trustee, to Charles Otis Hamilton. Deed in fee. Received March 6, 1867, and recorded in liber R. M. H., No. 29, folio 200, one of the land record for Washington County, and ex'd. R. M. Hall, registrar.

Charles Stott and wife to George E. Kirk. Deed.

77 This indenture, made this fourteenth day of May, in the year of our Lord one thousand eight hundred and seventy-two, between Charles Stott and Esther Ann Stott, his wife, of Washington City, District of Columbia, of the first part, and George E. Kirk, of the same city and District, of the second part, witnesseth:

That the said parties of the first part, for and in consideration of the sum of four thousand dollars in lawful money of the United States, to them in hand paid by the said party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, and conveyed, and do by these presents grant, bargain, sell, alien, enfeoff, release, and convey unto the said party of the second part, his heirs and assigns forever, all those several pieces or parcels of ground lying and being in the city of Washington, in the District of Columbia, to wit: Lot numbered seventy-eight (78), in square numbered four hundred and sixty-five (465), as subdivided also part of lot numbered nine (9), in square numbered four hundred and thirty-seven (437); also, all that part of lot or parcel of ground known as the west half of part of lot numbered eleven (11), in square numbered four hundred thirty-seven (437); also, all that piece or parcel of ground known as lot numbered ten (10), in square numbered four hundred and thirty-seven (437), commencing for the same at the northeast corner of said lot and running thence due west by and with the line of F street south 19 feet and four inches; thence south 66 feet and two inches; thence east 19 feet and four inches; thence north by and with the dividing line of said lot; and lot No. 11 in said square, being the same property conveyed by Henry Gray and wife to Major Garnett on the 1st day of November, 1843, and recorded March 23, 1844, in Liber W. B. No. 107, folios 179 et seq., one of the land records for Washington City, in the District of Columbia, and by said Major Garnett to said George E. Kirk by his deed, bearing date 12th of April, 1854, being the same property that was subsequently conveyed by George E. Kirk and wife to Charles Stott by deed dated March 22, 1856, and recorded in Liber J. A. S., No. 115, fol. 423 et seq. of the records for Washington, D. C., and is this 14th day of May, 1872, reconveyed to the said George E. Kirk, his heirs, and assigns, by the said Charles Stott, together with all the improve-

78 ments, ways, easements, rights, privileges, appurtenances, and hereditaments to the same belonging, or in anywise appertaining, and all the remainders, reversions, rents, issues, and profits thereof, and all the estate, right, title, interest, and claim whatsoever, either at law or in equity, of the said parties of the first part of, in, and to the said pieces or parcels of land and premises.

To have and to hold the said pieces or parcels of land and premises with the appurtenances unto the said party of the second part, his heirs and assigns, to his and their sole use, benefit, and behoof forever.

And the said Charles Stott, party of the first part, for his heirs, executors and administrators, do hereby covenant, promise, and agree to and with the said part' of the second part, his heirs, and assigns, that he, the said party of the first part and his heirs shall and will warrant

and forever defend the said piece or parcel of ground and premises and appurtenances unto the said party of the second part, his heirs and assigns, from and against the claims of all persons claiming or to claim the same, or any part thereof by, from, under, or through him, them, or any of them, and all persons whatsoever.

And further, that he, the said party of the first part, and his heirs, shall and will, at any and times hereafter, upon the request and at the cost of the said party of the second part, his heirs and assigns, make, execute, deliver, and acknowledge all such other deed or deeds, or other assurances in law, for the more certain and effectual conveyance of the said pieces or parcels of land, and premises, and appurtenances unto the said party of the second part, his heirs or assigns, as the said party of the second part, his heirs or assigns, or his counsel, learned in the law, shall advise, devise, or require.

In testimony whereof the said party of the first part have hereunto set their hands and seals on the day and year first hereinbefore written.

CHARLES STOTT. [SEAL.]
ESTHER A. STOTT. [SEAL.]

Signed, sealed, and delivered in the presence of, having first been duly stamped—

H. CLAY JOHNSON.

[Stamp.]

79 DISTRICT OF COLUMBIA,
County of Washington, ss:

I, H. Clay Johnson, a notary public in and for the county aforesaid, do hereby certify that Charles Stott and Esther Ann Stott, his wife, of Washington City, in the District of Columbia, parties to a certain deed, bearing date on the fourteenth day of May, A. D. 1872, and hereto annexed, personally appeared before me in the county aforesaid, Charles Stott and Esther Ann Stott, his wife, being personally known to me to be the person who executed the said deed, and acknowledged the same to be their act and deed, and the said Esther Ann Stott, wife of the said Charles Stott, being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it.

Given under my hand and notarial seal this twentieth day of May, A. D. 1872.

[L. S.] H. CLAY JOHNSON,
Notary Public.

(Endorsed:) Deed. Charles Stott et ux. to George E. Kirk. Received for record on the 27th day of May, A. D. 1872, and recorded in liber No. 679, folio 345, one of the land records for Washington County, in the District of Columbia, and examined by—

S. WOLF, *Recorder.*

In the supreme court of the District of Columbia the 12th day of July, 1876.

GEORGE E. KIRK, PLAINTIFF,
vs.
CHARLES O. AND CATHERINE HAMILTON, DEFENDANTS. } No. 10340.

The plaintiff having appealed to the general term from the judgment pronounced herein on the 23d day of June, 1876, in the supreme court in special term, he and James W. Barker, his surety for said appeal, for themselves and each of them, their and each of their heirs and personal representatives, appearing and submitting to the jurisdiction of
80 the said general term, hereby undertake to abide by, perform, and pay its judgment, which they agree may be pronounced against all of them.

G. E. KIRK, *Appellant.* [SEAL.]
JAMES W. BARKER, *Surety.* [SEAL.]

This bond is quite satisfactory to me.

F. W. JONES,
Attorney for Defendants.

Approved.

D. C. HUMPHREYS.

(Endorsed:) No. 10340. George E. Kirk, plaintiff, vs. Charles O. Hamilton and Catherine Hamilton, defendants. Undertaking for appeal by plaintiff to general term. Filed July 13, 1876. R. J. Meigs, clerk.

81 Proceedings before the supreme court of the District of Columbia, sitting in general term, commencing Monday, January 1, 1877.

Present, Chief Justice Cartter and Justices Olin, Wylie, Humphreys, and MacArthur.

WEDNESDAY, *March* 7, 1877.

Session resumed pursuant to adjournment.
Present, Justices Olin, Wylie, Humphreys, and MacArthur.

GEORGE E. KIRK, PLAINTIFF,
vs.
CHARLES O. HAMILTON & CATHERINE HAMILTON, def'ts. } At law. No. 10340.

Argued by Messrs. Miller & Pike for plaintiff, and Messrs. Edwards & Barnard for defendants, and submitted to court.

WEDNESDAY, *March* 21, 1877.

Session resumed pursuant to adjournment.
Present, Justices Olin, Wylie, Humphreys, and MacArthur.

82 GEORGE E. KIRK, PLAINTIFF,
vs.
CHARLES O. HAMILTON & CATHARINE HAMILTON, def'ts. } At law. No. 10340.

And now again come here as well the plaintiff as the defendants, by their respective attorneys, and thereupon, because it appears to the court here that there is no error in the proceedings of the circuit court or in its judgment, it is considered by the court that the judgment of the circuit court be and the same is hereby affirmed, notwithstanding the exceptions aforesaid to its rulings, and that the defendants recover against the plaintiff the costs of the said defendants in this court, to be

taxed by the clerk as part of the costs of the case, and that the defendants have execution thereof.

83 In the supreme court of the District of Columbia, the 13th day of August, 1877.

GEORGE E. KIRK, PLAINTIFF,
vs.
CHARLES O. HAMILTON AND CATHARINE Hamilton, defendants.
At law. No. 10340. In error.

Know all men by these presents that we, George E. Kirk and Jas. W. Barker, are bound unto the above-named Charles O. Hamilton and Catharine Hamilton in the sum of two hundred and fifty dollars, to be paid to the said Charles O. Hamilton and Catharine Hamilton, their executors or administrators, to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 13th day of August, 1877.

Whereas the above-named George E. Kirk hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named George E. Kirk shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

G. E. KIRK. [SEAL.]
JAMES W. BARKER. [SEAL.]

Sealed and delivered in presence of—
WM. H. LEWIS.
LEUTHER H. PIKE.

Approved.

A. WYLIE.

AUG. 13, 1875.

84 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is in the said court before you, between George E. Kirk, plaintiff, and Charles O. Hamilton and Catherine Hamilton, defendants, a manifest error hath happened, to the great damage of the said George E. Kirk, as by his complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to

be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 13 day of August, in the year of our Lord 1877 and of the Independence of the United States the 102.

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *to wit:*

To Charles O. Hamilton and Catherine Hamilton:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein George E. Kirk is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness, D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

Copy of writ of error acknowledged this 13th day of August, 1877.

EDWARDS & BERNARD,
Of Counsel for Def'ts in Error.

85 CLERK'S OFFICE,
Supreme Court of the District of Columbia, ss:

I, Return J. Meigs, clerk of the said court, do hereby certify that the writing and printings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 24th day of September, A. D. 1877.

[SEAL.]

R. J. MEIGS,
Clerk.
By J. JAY CAMP,
Ass't Clerk.

(Indorsment on cover:) No. 279. George E. Kirk, plaintiff in error, vs. Charles O. Hamilton and Catharine Hamilton. Dist. of Columbia, Sup. Court. Filed 12th October, 1877.

IN THE

Supreme Court of the United States.

TERM OF 1879-1880.

GEORGE E. KIRK, Plaintiff in Error,

vs.

CHARLES O. AND CATHARINE HAMILTON.

No. 279.—Error to Supreme Court of the District of Columbia.

BRIEF OF PLAINTIFF IN ERROR.

ALBERT PIKE,
LUTHER H. PIKE,
Of Counsel.

Globe Job Print.

IN THE

Supreme Court of the United States.

KIRK VS. HAMILTON.

Brief of Plaintiff in Error.

FACTS.

1. On the 21st of November, 1859, bill in equity was exhibited in the Circuit Court of the District of Columbia by D. W. Moore, trading under the name of D. W. Moore & Co., against George E. Kirk and several others. (Record, 11.)

2. The bill alleged that *they*, the orators, in August, 1856, obtained four judgments against Kirk before a justice of the peace of the county of Washington, D. C., on each of which *fi fa* was issued by another justice and returned by constable *nulla bona*. Aggregate of principal adjudged and interest in the four cases, $163.27.

3. The bill alleged that Kirk, owning realty in the city of Washington, had conveyed it away for the purpose of delaying, hindering, and defrauding the orators in the recovery of their said debts, viz: lot 73, in subdivision of square 465, and parts of lots 7, 9, 10, 11, and 12, in square 437.

4. It specified the following conveyances:

a. To Lenox & Naylor, 9th August, 1853, parts of lots 9 and 7, in square 437, in trust to secure payment to a building association of a sum of money stated in the deed.

b. To Clarke & Smith, 24th March, 1856, a portion of the same to secure payment to Sweeny of a note for $1,600.

c. To Robinson, parts of lots 10 and 12, in square 437, to secure payment to Garnett of four notes for $131.25 each.

d. To Goddard, the west half of lot 11, in square 437, to secure payment to Angus of a note for $500.

All these persons were made defendants.

5. That on the 22d of April, 1858, Kirk purchased of Martin, a defendant, who conveyed to him as trustee, for the benefit of his wife and children, (who were *not* made defendants) parts of lots 43, 44, 45, and 46, in square 465, he, Kirk, paying the purchase money and taking the conveyance so, for the purpose of defrauding, hindering, and delaying his creditors.

6. The bill did not admit, but denied and required proof of the reality of the debts and notes secured, but claimed that if any of them, or any part of them, were due and unpaid, the property was of larger value, and Kirk's equitable estate on the land was liable in equity to their judgments; that no sales had been made under the deeds, and Kirk had all the time held and enjoyed the property.

7. The bill alleged that on the 22d of March, 1856, Kirk, for the pretended consideration of four thousand dollars, had conveyed to Charles Stott, a defendant, lot 78, in the subdivision of square 465, and parts of lots 7, 9, 10, 11, and 12, in square 437; that there was no such consideration, but the conveyance was purely voluntary and designed to hinder, delay, and defraud complainants in the recovery of their judgments, which it had done: that Kirk had all the time retained possession and enjoyment of the property and received the rents and profits; but if any money was paid or advanced, it was by way of mortgage.

8. Prayer, that the deed to Stott be decreed null and void as against complainants; for sale of the lands conveyed by

that and the other deeds, or enough of it to pay such debts as might be found really due and secured by them, and then the moneys due the complainants; and for general relief.

9. The only exhibits were the deeds to Lenox and Naylor; to Clarke and Smith, and to Stott.

10. Service of subpœna on all the defendants except Garnett and Martin; default of appearance and answer at rules, and bill taken *pro confesso*. Wherefore, on the 30th of May, 1860, decree final against Kirk and the others in default.

11. The bill prayed that if there were debts to be satisfied by the deeds to trustees, the complainants' judgments might be paid after satisfying such debts, and that sale of the premises being made by the trustees, they ought to bring the moneys arising from such sales into court for distribution under its direction. (Record, 14.)

12. The court decreed sale of "the property in the bill mentioned, described, and referred to," to wit: parts of lots numbered 7 and 9, in square 437, and lot 78, in square 465, (nothing is said about lots 10, 11, and 12,) "for the payment of said complainants' claim *and others who may come in as creditors of the said George E. Kirk, by petition in the manner and form required by law and the practice of the court.*"

13. Edward C. Carrington was appointed trustee and directed how to sell and report, and ordered to bring into court the money and notes received "*to be distributed and disposed of under the direction of this court.*" (Record, 26.)

14. Trustee Carrington reported sale by him of lot 73 *only*, for $1,480—one-third cash, two-thirds notes, to be lessened by $150 paid by purchaser to the person in whom the title really was; and reported that, "having sold sufficient property to pay and satisfy the claims provided for in said bill and decree," he "discontinued the sale of the other property men-

tioned in the proceedings." No exceptions were taken to the report up to the 28th of October, 1862; and it was then ordered by the court that the sale so made and reported be ratified and confirmed, and that the auditor take and state the trustee's account and make distribution. (Record, 37–29.)

16. November 24 the auditor reported. No person named in the bill had claimed an interest in the fund, as a creditor of Kirk; lot 78, the only one sold, not having been conveyed to secure anybody; but *before* and *after* the decree (the auditor states,) a number of creditors of Kirk had filed petitions to be paid out of the fund in the trustee's hands.

Two creditors had filed petitions on the 1st of March, 1860, *i. e.*, after decree *pro confesso* at rules and before final decree, seeking payment, one of a judgment before a justice of the peace; the other of a judgment in the Circuit Court.

One had filed petition in December, 1860, on a judgment in the Circuit Court; others in 1862, in October and November, before the auditor; one on a judgment in the Circuit Court; the others on notes, drafts, and open accounts. (Record, 29, ff.)

17. The auditor said in his report that none of these claims and claimants were mentioned in the bill, (which was filed by Moore & Co. alone, to establish their own judgments only, and was not for the benefit of themselves and such other creditors of Kirk as might come in;) that Kirk had no opportunity of being heard in relation to them—the confession taken being as to Moore & Co.'s judgment only. (Record, 30.)

18. No notice of publication or other notice had been given by any of the petitioners, and Kirk had not been called on to answer as to them; wherefore, the auditor did not admit them as claims on the fund of $1,008.52, residue in trustee's hands. The petitions, whether filed before or after decree, do not appear in the record. Those who petitioned before, *i. e.*, in March, 1860, after the decree *pro confesso* at rules, were not made parties to the suit by any order of the court,

nor does it appear that they applied to be made parties. If they had been, the distribution would have been *pro rata*—Moore & Co. not being paid in full, *as they were*. (Record, 29–30.)

The creditors, Summers & Co., or Summers & Pender, who filed petition on 1st March, 1860, had a justice's judgment, obtained in 1856, amounting to $58.46. Garnett & Co., petition filed same day, a judgment of the Circuit Court, obtained in 1856, amounting to $483.95. No other petitions were filed before the final decree of May 30, 1860. * * * S. White, petition filed 19th December, 1860, had a judgment of the Circuit Court, obtained in 1859, amounting to $95.16. * * * Sweeny & Co., petition filed 16th October, 1862, had a judgment of the Circuit Court, obtained in 1856, amounting to $151.19. * * * Shulhers & Co., petition filed in 1863, before second sale, had judgment of Circuit Court, obtained in January, 1862, in a suit commenced in October, 1861, amounting to $335.35. * * * Van Riswick, a simple contract creditor, sued in January, 1862, having process of attachment, obtained judgment of condemnation in May, 1862, and on the 24th of December, 1864, filed short copies of his judgments and claimed the whole proceeds of the second sale, to the exclusion of the other creditors; amount of his judgments, $905. * * * Moore & Co. had another justice's judgment, filed in 1864, amounting to $52.61.

Thus the claims in which petitions were filed before the decree amounted to $542.41. The justice's judgment of Summers & Co. was not a lien on Kirk's legal or equitable interest in the land; and the only judgments that were such (having been obtained before the decree) were those of Garnett & Co., White, and Sweeny & Co., amounting to $730.-30. The balance in the hands of the trustee of proceeds of first sale was $1,008.52. (Record, 30, 42, 46, 32.)

19. This report was filed November 25, 1862. On some day, in November, 1863, Asbury Lloyd appeared before the

clerk of the Supreme Court of the District and made oath that George E. Kirk did not reside in and was not a resident of the District.

20. Upon this, one of the justices, on the 14th of November, 1863, made an order of publication reciting the filing of petitions, in case 1563 of Moore & Co. vs. Kirk, of the persons mentioned by the auditor, and one other firm, claiming to be creditors of Kirk by virtue of certain judgments, notes, &c., and that Kirk was not a resident of the District, and therefore ordering that notice of the character and object of their petitions be given by publication of a copy of the order in the *National Intelligencer* once a week for six weeks, warning him to appear by the 2d Tuesday of January, 1864, or "the petitions and claims" would be taken as confessed. (Record, 32.)

21. On the 2d day of February, 1864, in "Moore & Co. *vs.* Kirk and others, 1563, Equity," an order was entered, that "it appearing to the clerk that Kirk, and" the others against whom the bill had been taken as confessed at rules in January, 1860, had "failed to appear and answer in this suit," it was "ordered by the clerk that *the bill and the matters thereof* be taken for confessed against the above defendants." (Record 33.)

22. On the 12th of February, "the petitions and claims filed in the above cause having been taken as confessed at rules," it was ordered by the court, "that this cause and said petitions and claims be referred to the auditor," to state the trustee's account "and make distribution of the balance of the fund in the hands of the trustee."

23. The auditor distributed the moneys in hand among the five judgment creditors, ratably, 82.7 per centum on each judgment; in all, $930.02. There remained seven simple contract creditors, claiming $1,569.31, two of them not proven; and the auditor said, "there is other property

mentioned in the decree which has not been sold by the trustee, and other property mentioned in the bill which has not been decreed to be sold." (Record, 36.)

24. This report was ratified and confirmed, and the trustee ordered to distribute accordingly. (Record, 38.)

25. Then, *without further order to sell*, the trustee, Carrington, gave notice that by virtue of the decree of 30th May, 1860, in the case of Moore & Co. v. Kirk and others, he would sell, on the 14th of April, 1864, "parts lots of ground numbered 437," * * * as described in the proceedings in the said cause," with improvements thereon—a two-story brick house. (Record, 38.)

26. He reported, on the 10th of November, 1864, that he gave due notice as required, by publication in two newspapers named, published in Washington, of the time, place, manner, and terms of sale, and *did* sell, *not* on the 14th of April, but "on the 19th day of April, A. D. 1864, *being a postponement from the 14th April, in order to procure a plat of said ground*," parts of lots 7 and 9 in square 437, to Charles O. Hamilton, for $950, he being the highest bidder. *It does not appear that any sort of notice of sale to be made on the 19th was given.*

There was no notice of the sale given. The notice given was to sell on the 14th of April, at five o'clock, (whether A. M. or P. M., was not stated in it,) at public auction, in front of the premises. The sale was *not* made on that day; it was postponed. It was pretended to be made under the decree of May, 1860, (and there was no other order or decree for sale,) and that required two weeks' *notice*, by three insertions per week, in some newspaper in Washington, of the time, place, manner, and terms of the sale. There was, therefore, not time to advertise again. Nor does his report show at what hour of the day he did sell. (Record, 38, 39, 49.)

The court ordered that the sale should be ratified and confirmed, unless cause to the contrary shown by the first Tuesday in December, 1864, and notice of this to be given by advertisement. This order was made on the 10th of November. (Record, 40.)

28. Publication of order proven, no exception taken, sale ratified and confirmed, and reference to the auditor for account and distribution, 12th December, 1864. (Record, 41.)

30. Report of auditor, June 8, 1865. He published notice to creditors of Kirk to attend, and several *other* creditors presented claims. The court directed notice on the 21st of December, 1864, to Kirk, to be made by publication, once a week for six weeks. There is no statement that the publication was made. (Record, 42, 43.)

31. "Pending this last reference of December, 1864, and before the cause was considered, Kirk returned from the South," and appeared by counsel on the reference, contesting the existence of part of the claims. This was on the 1st of June, 1865. (Record, 43, 45.)

32. The auditor distributed the fund among the judgment creditors only; and his report was ratified and confirmed on the 5th of September, 1865. (Record, 47.)

33. The trustee, Carrington, on the 14th of December, 1866, conveyed to Charles O. Hamilton, (the defendant in error,) parts of lots 7 and 9, in square 437, "of the authentic ground plan or plat of the city of Washington."

The description is, for the part of lot 9, "beginning at a point on South F street 83 feet from the northwest corner of square 437, thence south 86 feet 2 inches to the rear of said lot, thence west 13 feet 8 inches, thence north 20 feet, thence west 3 feet 4 inches, thence north 66 feet 2 inches, to South F street, and thence east, on the line of that street, 17 feet to place of beginning."

And, for the part of lot 7, beginning at a point on the

north line of it, 69 feet 4 inches from Eighth street west, "being the angle formed by the dividing lines between said lot and lot No. 9, according to the plan of the said city;" running thence south 20 feet, and thence west 3 feet 4 inches, thence north 20 feet, and thence east 3 feet 4 inches, with the north line of said lot to the place of beginning. (Record, 48–9.)

34. On the 21st of December, 1872, Kirk brought ejectment against Hamilton to recover the land conveyed by the trustee, Carrington, to him, describing it as in that conveyance it is described Upon the general issue the case was tried by a jury. The plaintiff proved that he had paid the debts secured by the two conveyances in trust, and that Stott and wife had reconveyed to him, in 1872, the lands conveyed to him, Stott, in 1856. The deed of Stott and wife was put in as proof. (Record, 5.50.)

35. The defendant was allowed, against the plaintiff's objection, to prove that he had built upon the land at large cost, and that Kirk, residing on adjoining land, knew of his building, and made no objection and asserted no claim to the land, until he brought suit, except as to three feet of the alley. To the admission of this evidence the plaintiff excepted. (Record, 6.)

36. The defendant relied on the trustee's deed to him, and the record in the suit of Moore vs. Kirk and others; and the plaintiff objected to the admission of the deed and record, asserting that, so far as the proceedings in Moore vs. Kirk were relied on to prove the second sale by the trustee, Carrington, they were without jurisdiction, *coram non judice*, and therefore objected to the admission of the record as evidence. He insisted that, at least, the proceedings subsequent to the ratification and confirmation of the auditor's report, in October, 1862, and distribution of the proceeds of sale under order then made, was without jurisdiction, *coram non judice*, and void; that the decree of May, 1860, was fully satisfied

by the sale of lot 78, its ratification and distribution of the proceeds, and there was no valid order or decree afterwards, authorizing the second sale, which, therefore, was null and ineffectual, and gave Hamilton no title. But the court held the sale valid and the trustee's deed effectual. (Record, 5, 6, 7, 8, 9, 10.)

37. The court held that the proceedings, not having been appealed from and standing unreversed, and not annulled, were valid until reversed and annulled by the proper court, upon proper proceedings had therein for that purpose; that the record could not be impeached for want of jurisdiction in the court in a purely collateral proceeding, which the suit in ejectment was, and the sale was a valid one, until reversed, annulled and set aside by direct proceedings instituted for that purpose in the proper court. (Record, 10, 11.)

38. Accordingly, the court directed the jury to find for the defendant, except as to three feet front, of the eastern side, the whole depth of the land, and instructed them, if they should find that this strip was not included in the original bill filed, and in the decree of May, 1860, they should find, as to that, for the plaintiff. The jury found for the defendant for the whole. (Record, 10, 11.)

39. The plaintiff moved for a new trial, for errors in said rulings, and because the verdict was contrary to law and evidence; the motion was overruled and bills of exceptions reserved at the trial were taken and signed. (Record, 3, 4, 5.)

40. On appeal to the court in general term the judgment of the Equity Court was affirmed. (Record, 52.)

ASSIGNMENT OF ERRORS.

The plaintiff in error says that in the record and proceedings aforesaid, in the said Supreme Court of the District of Columbia, and in the giving of judgment aforesaid by that

court, in general term, upon the appeal of the said plaintiff in error, there is manifest error.

1. In this, to wit, that the said Supreme Court, by affirmance of the judgment of the said Supreme Court at law against him, rendered in favor of the defendant in error, did decide and adjudge that the said defendant in error had the right to prove that at the time of his purchase of the premises in the declaration mentioned, at a sale made by the trustee in the equity cause of D. W. Moore & Co. vs. George E. Kirk and others, the only improvement on said property was a two-story five-room brick house, and that about the year 1863 the defendant in error built an extension house on said property at a cost of some four thousand dollars; that at the time he began the erection of said building, and for some time thereafter, the plaintiff in error resided adjoining the premises; that during all that time he well knew of said building, and made no objection thereto, and asserted no claim to said property, except to the west three feet thereof which adjoined the ground of the plaintiff in error, and which he claimed as an alley, and afterwards admitted he was mistaken about; and that, though residing in the city of Washington ever since about the year 1865, he never, to the knowledge of the defendant in error, asserted any claim to the premises in question until the commencement of the suit; and the said Supreme Court, in general term, did adjudge and decide that the said proof was properly permitted to go to the jury, against the objection of the said plaintiff in error, and that his exception in respect thereof was not well taken.

2. There is also manifest error in this, that by the record and proceedings aforesaid it appears that the said Supreme Court of the District of Columbia, in general term, affirming the judgment of said court of original jurisdiction, decided and adjudged that the said last-mentioned court properly instructed the jury that the sale made by the said trustee, on the 19th of April, 1864, under and by virtue of

which he conveyed the premises to the defendant in error, was a valid and legal sale, under the said decree of May, 1860, and properly instructed the jury to find therein for the defendant in error that he had good and valid title thereunder; whereas the said sale was not valid or legal, because there was no order or decree of the Court of Equity ordering it to be made, and because there was no notice given thereof as required by said decree of May, 1860; but on the contrary, the notice given was that the sale would be made on the fourteenth of April, at five o'clock, whether in the morning or afternoon of that day not being specified therein; and the sale was postponed by the trustee, and made on the nineteenth of April, without any notice at all, and at what hour does not appear. So that the said sale was absolutely null and void, and could not be ratified and confirmed by the court.

3. There is also manifest in error in this, that the said Supreme Court of the District of Columbia, in general term, did on such appeal adjudge and decide that the certain exemplification of record of the proceedings of the Circuit Court of the District of Columbia and of the Supreme Court of the District of Columbia, in the case in equity in said courts of D. W. Moore & Co. against the plaintiff in error and others, as the same is made of record by the bills of exception taken and signed, in the suit from the judgment wherein there was appeal as aforesaid, was properly permitted to be read in evidence by the defendant in error to the jury against the objection of the plaintiff in error, and that the exception of the plaintiff in error in respect thereof was not well taken.

4. There is also manifest error in this, that by the record and proceedings aforesaid it appears that the said court below, upon the appeal aforesaid, did decide and adjudge that the said Supreme Court, at law, did properly decide, against the objection of the plaintiff in error, that the proceedings had in equity, as aforesaid, in the said suit of D. W.

Moore & Co. vs. George E. Kirk and others, were not, so far as they affected the title to the land in controversy, *in toto* beyond its jurisdiction, nor *coram non judice*, nor null and void, conferring no power to sell the said premises; and properly instructed the jury and decided to the contrary thereof; and that, therefore, the said court below held the exception of the plaintiff in error, in respect thereof, not to be well taken.

5. There is also manifest error in this, that by the record and proceedings aforesaid it appears that the said court below, upon the said appeal, affirmed the adjudication and decision of the said court whose judgment was appealed from; that the said courts in said suit in equity did not proceed without jurisdiction, after the ratification and confirmation, in October, 1862, of the report made by the trustee of the sale made by him under the decree of the said Circuit Court, and after distribution of the proceeds of said sale approved; and that the actions and proceedings thereafter, in the said courts in equity, were not *coram non judice*, and null and void, conferring no power or authority to sell upon the trustee; and that, therefore, the said court below, affirming the judgment appealed from, did hold the exceptions of the plaintiff in error, in respect of the ruling aforesaid, not to be well taken.

6. There is also manifest error in this, that the said court below, in affirming the said judgment appealed from, did adjudge and decide that it was not error in the Supreme Court at law to decide against the plaintiff in error; that the said record of said suit in equity was good and sufficient in law to show title in the defendant in error to the land in controversy, included in the original bill filed, and in the decree of May 30, 1860, rendered in said Equity Court; that the proceedings therein had, not having been reversed or annulled, were valid, and the record could not be impeached collaterally in the said suit, the judgment wherein was appealed from, for want of jurisdiction of said Equity Court; that the sale in which the defendant in error purchased the

premises was a valid sale of binding force and effect, until it should be reversed, annulled and set aside upon proceedings in the proper court instituted to that end; that the court of original jurisdiction properly instructed the jury to find for the defendant in error, except as to the said strip of three feet front by the whole depth of the land, and that the exception of the plaintiff in error, in respect thereof, was not well taken.

7. There is also manifest error in this, that the court below decided, on said appeal, that the said court at law of original jurisdiction properly declined to instruct the jury that the said strip of land, of three feet front by the depth, not being included in the said bill or decree, the sale thereof was not valid, and the defendant in error had obtained no title thereto, but on the contrary left it to the jury to find from the evidence whether it was or was not included in the bill and decree, and upon the jury finding for the defendant in error for the whole, gave judgment accordingly; and the court below, on appeal, therefore held the exception of the plaintiff in error, in respect thereof, not well taken.

8. There is also manifest error in this, that by the record and proceedings aforesaid, it appears that the judgment aforesaid of affirmation upon appeal, by the said Supreme Court of the District of Columbia, in form aforesaid given, was given for the defendant in error against the plaintiff in error; whereas, by the law of the land, it should have been given in favor of the plaintiff in error against the defendant in error. For which, and other causes in the record and proceedings aforesaid apparent, the plaintiff in error prays that the judgment aforesaid, in form aforesaid given, and the judgment of the said court of original jurisdiction may be reversed, annulled, and wholly held for nought, and that he may be restored to all things that he has lost by occasion thereof.

POINTS OF LAW.

1. The defendant in error, to establish his title to the property, produced a conveyance purporting to be made under the

decree of May, 1860, in the case of D. W. Moore and others vs. Kirk and others, by the trustee appointed to make sale of the premises by that decree; and it recites that he made the sale on the *nineteenth* day of April, 1864, "after due notice, according to said decree."

To sustain this conveyance, the defendant in error offered the record of that suit, which showed that no new order to sell had been given, and that *no* notice of the sale was given, the only notice given being of a sale to be made on the *fourteenth* of April, at five o'clock, and the report of the trustee showing *that he postponed the sale*, in order to procure a plat. The decree of 1860 required two weeks' notice by three insertions per week, and therefore the notice required by the decree *could not* be given after the 14th. The sale thus made without notice was absolutely void, nor was the notice to sell on the 14th good, because it specified five o'clock, without saying whether in the morning or in the afternoon, and the report does not show at what hour of the day the sale was made.

2. Of course there can be no question as to the absolute nullity of a sale made by an officer, by whom the court acts, at a time when he had no authority to make it. He is the officer of the court to make a sale, *e. g.*, on the 10th day of April, at 10 a. m. If he makes it on another day, he acts merely as a private individual. The court has not made him its officer to do that; he is merely Mr. A. B. or C. D., amusing himself by selling other people's property.

3. The only real question is whether, admitting that the sale was made by a Mr. Carrington, not known to the court in making that sale, the purchaser is protected by the deed of this individual, pretending to have been acting as an officer of the court, or by the order of confirmation.

Where land is sold on execution on a day prior that specified in the notice of the sale, no title will pass to the pur-

chaser at the sale, or to any subsequent grantee, if they have notice of the irregularity.

King vs. Cushman, 41 Illin., 31.

4. The digests tell us that this court decided, in Richards vs. Holmes, 13 Howard, 143, that a trustee has power to adjourn a sale from time to time, if duly advertised, and it should seem to him necessary in order to secure a fair price.

What the court *did* decide was, that as the deed of trust empowered the trustee to sell at private sale, as well as at public auction, his power extended to a private sale, *made at any time after thirty day's notice;* that having given notice for the space of thirty days that he was about to sell, he might, at any time after the thirty days, have sold at private sale. And, moreover, of such adjournments of the sale public notice was given by advertisement in the same newspaper in which the first notice was published.

5. The sale, being absolutely void, could not be ratified and confirmed.

It is too clear for argument that a sale by the marshal, unauthorized by the decree, is without any validity.

Minnesota Co. vs. St. Paul Co., 2 Wallace, 640.

In that case the question was virtually decided that an order confirming a sale that is null for want of authority cannot make it valid.

The sale in this case was "unauthorized by the decree." The decree authorized the trustee to sell on the day which he should specify in his published advertisement. He fixed the 14th of April. He was authorized by the decree, then, to sell on that day, and on no other, without new advertisement. There was no one to raise the question whether he had a right to sell without notice on the 19th; and the court did not decide that the adjournment was proper and the sale valid.

6. The rule *caveat emptor* applies to purchasers at judicial sales, both as to title and as to the conditions of the property.

Barron vs. Muller, 21 Minn., 374.
Holmes vs. Shaver, 78 Illin., 578.

7. The purchaser at a *sheriff's* sale must look to the judgment, execution, levy, and deed. As to them the rule *caveat emptor* applies.

Bank of St. of Missouri vs. Bray, 37 Mo., 195.
Lenox vs. Clarke, 52 Mo., 115.
Wheaton vs. Sexton, 4 Wheaton, 503.
Brooks vs. Rooney, 11 Georgia, 423.
Phillips vs. Coffee, 17 Illin., 154.

8. This is the simple rule, that public officers and trustees sell under powers, and it is the business of purchasers, as prudent men are supposed always to do, to know whether the sale is authorized by the power, to be then and there made. So far as matters appear of record, the purchaser *has* notice; but where the authority to sell depends upon the advertisement being made, if the officer states that it has been duly made, the purchaser must perforce act on that, because he cannot often have the means of knowing that it has been made during so many weeks, so many times a week, in such and such papers.

9. But if the sale is made on one day, and the advertisement is to sell on an earlier or later day, and this is reported by the officer; and it appears of record, by his report, before confirmation of the sale, that there was no advertisement of the sale actually made, and the purchaser afterwards takes a deed, he is not protected. Why should he be? The officer asks the court to confirm a sale to him. He is certainly a party interested in that, and charged with notice of all that the report states. If he stands by and sees the court, ignorant of the fact that avoids the sale, confirm it as regularly made, he *ought* to lose the money he paid and the land which he knew to have been unlawfully sold.

10. Real estate sold in execution must be sold at the time and place announced in the notice given for such sale; and the sale cannot be postponed to another day by order of court without a new notice; and when a sale is so postponed, the purchaser is not protected by his good faith, if the want of notice or defect of notice appears on the face of the sheriff's deed. In such case the deed confers no title, and will be held worthless in an action of ejectment.

Merchants' Bank of Missouri vs. Evans, 51 Mo., 335.
Jackson vs. Magruder, 51 Mo., 55.
White vs. Wilhite, 53 Mo., 71.
Patton vs. Stuart, 26 Indiana, 395

Where notice of sale has been published, if there be an adjournment, it is necessary that there should be a new notice given for the same length of time required in the first instance, as the first notice was exhausted by the adjournment.

Thornton vs. Boyden, 31 Ill., 200.
Griffin vs. Marine Co., 52 Ill., 130.

11. The defendant in error, therefore, himself showed, by the record and deed, that he had obtained no title at all; and yet the court instructed the jury to find for him, and that the sale was valid and legal.

12. Could one creditor, or two, of a living individual, bring a bill for themselves and all other creditors, to have cancellation of a conveyance, and sale for the benefit of all, in which the others could come in by petition, even after decree?

13. That the bill in this case neither was nor was regarded by the court as a creditor's bill, is plain from the fact that under it the creditors were not paid *pro rata*. Moore & Co. being paid in full, and the others receiving only dividends, to amounts less than their claims.

14. If the creditors who filed their petitions before final decree could be considered parties thereby entitled to be paid,

they alone could be, and no further sale was necessary to pay them. They were Summers & Co., whose claim amounted to $58.46; and Garrett & Co., whose claim was $483.75. There was a balance in the trustee's hands of $1,008.52, more than enough to pay them in full.

15. Whilst it is true that with reference to courts of superior or general jurisdiction, the general rule is that every presumption is to be indulged in favor of their jurisdiction, yet it is equally true that such presumptions must be not inconsistent with the record. That is to say, the presumption of jurisdiction can be indulged only where the record *fails* to show that the court had *not* jurisdiction; or, stating the proposition affirmatively, where it affirmatively appears by the record that any such court proceeded in any particular case without jurisdiction, the presumption of jurisdiction cannot be indulged, for there can be no presumption against the record.

7 Robinson Pr., 62, 63, citing authorities.

16. It has been stated by high authority, Mr. Justice Swayne, in McNitt v. Turner, 16 Wall., 365, that "It is an axiomatic proposition that when jurisdiction *has attached*, whatever errors may subsequently occur in *its* exercise, the proceeding being *coram judice*, can be impeached collaterally only for fraud. In all other respects it is as conclusive as if it were irreversible in a proceeding for error. He followed this by what was said by Mr. Justice Baldwin in Grignon's, &c. v. Astor, 2 How., 340.

17. It will be observed that it is stated that the errors and irregularities must be committed *in the exercise of jurisdiction*, and we state it as an equally axiomatic proposition that where although jurisdiction has attached and errors or irregularities are committed by the court without or in excess of its jurisdiction, to such extent will such court's proceedings be *coram non judice*, null and void.

7 Robinson's Pr., 63, 64, citing authorities.
Id., 102–109. " " "
Bloom v. Burdick, 1 Hill, 139.
Boswell's Lessee v. Otis, &c., 9 How., 348.
Cornett v. Williams, 20 Wallace, 250.
Tyler v. Defrees, 11 Wallace, 344.
Cooper v. Reynolds, 10 Wall., 315.
McGoon v. Scales, 9 Wall., 30.

18. The *jurisdiction* of *any* court exercising authority over a subject may be inquired into in *every other* court where the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings; and the rule prevails whether the decree or judgment has been given in a court of admiralty or chancery, ecclesiastical court or court of common law, or whether the point ruled has arisen under the law of nations, the practice in chancery, or the municipal law of States.

Williamson v. Berry, 8 Howard, 540.
Shriver's Lessee v. Lynn, 2 Howard, 59.
Galpin v. Page, 18 Wallace, 366, 369, 370.
Thompson v. Whitman, 18 Wallace, 465, 467.
Webster v. Reid, 11 Howard, 460.
Voorhees v. Bank of the United States, 10 Peters, 474.
Gray v. Larrimore, 2 Abb., U. S. R., 548.
McMinn v. Whelan, 27 Calif., 348.
Forbes v. Hyde, 31 Calif., 348.
Penobscot R. R. Co. v. Weeks, 52 Maine, 463.
Coit v. Haven, 30 Conn., 197.
Robinson's Pr., vol. 7, p. 109, *et seq.*

19. Though it is true, that whilst the records of courts of superior or general jurisdiction are to be received as absolute verities, to contradict which there can be no averment or evidence, (Grignon's, &c., v. Astor, 2 How., 340, citing 6 Peters, 729,) yet so far as the jurisdiction of the courts, whose records they are, is concerned, whatever may appear in and by them showing want of jurisdiction in such courts over the

subject or the person, it is to be received as being equally and absolutely true as that which appears showing the existence of jurisdiction; that is to say, the absolute verity of the record is to be received as equally potential in what it speaks against as in what it speaks in favor of any jurisdictional fact.

Or we may state this point in this form: "Time can never authorize the presumption that an existing record apparently complete and perfect is not substantially what it always was, and especially that anything which it expresses or imports, either for or against any question of fact, whether of jurisdiction or otherwise, is false."

Shaefer v. Gates, 2 B. Mon., 457.

20. There was no law in force in the District of Columbia, until after 1864, enabling the Circuit Court to obtain jurisdiction to try and determine any matter between Kirk and his creditors, upon their filing their claims against him in a suit in which they were not parties. There was no law by which a notice of such filing, published in a newspaper, made it obligatory on him to appear. It was not service of process on him, or lawful notice, or notice in law, at all.

The only laws upon the subject of notice by publication, except in special matters, which we need not notice, were these:

1785, chap. 72, sec. 30. Mortgagor of realty in Maryland to a citizen of the State, or any person claiming under mortgages, residing out of Maryland, in the United States, service of notice, "or inserting the same in the public newspapers of the State" where he resides, for twelve weeks successively.

1795, ch. 87, sec 1. In any case whatever, where bill filed against person or persons not residing within the State, the chancellor may direct such notice of bill and its object, by advertisement in newspapers or otherwise, as to him shall seem proper, warning defendant or defendants to appear, on

or before some day to be fixed, *not less than four* months distant from the time of the first advertisement, or other notice, to show cause. Right of review at any time within eighteen months after decree, on bill filed therefor.

1797, ch. 114. Notice by advertisement on bills filed against heirs of person deceased; and where subpœna returned *non est* by the sheriff of the county within the State where defendant was known or generally supposed to reside, and affidavit of evading service of process, notice to be in some convenient newspaper, at least three weeks successively, fixing day to appear not less than four months subsequent to the publication.

No other Statute until 1867.

21. Even Moore or Moore & Co. had no right to file a creditor's bill, and the other creditors neither did nor could have filed one. As to Moore, the question is settled. Kirk was served with process at his suit, and as he did not raise the question there, is concluded. But he never had any opportunity to contest the claims of the others, and can now show that the proceedings in their behalf were null; that their claims were not such as to give the court of equity jurisdiction to decree their payment by sale of his lands. The court, *quà* these creditors, had no manner of jurisdiction of the subject-matter, but simply usurped it.

22. A judgment creditor must exhaust his remedy at law before he can file a creditor's bill in chancery for the collection of his judgment.

Manning vs. Merritt, 1 Clarke, 98.
Storms vs. Ruggles, id., 148.
McElwain vs. Willis, 9 Wend., 548.
Crippen vs. Hudson, 3 Kernan, 165.

23. The commencement of the first suit in equity by a judgment creditor gives him a preference over other judgment creditors, even if the other judgments are elder.

Weed vs. Pierce, 9 Cowen, 729.

Burrall vs. Leslie, 6 Paige, 445.
Corning vs. White, 2 Paige, 568.
Boynton vs. Rawson, 1 Clarke, 588.

24. An action in the nature of a creditor's bill cannot be sustained on a justice's judgment, until it has been docketed in the county clerk's office, and an execution against realty as well as personalty of debtor returned unsatisfied. To entitle a judgment creditor to maintain such an action to remove fraudulent incumbrances from property, liable to sale or execution, *he must have a specific lien on the property.*

Crippen vs. Hudson, 3 Kernan, 161.
Reubens vs. Joel, id., 490.

25. The objection that the complainants have not shown any attempt to enforce their remedy at law is fatal to the relief prayed. A court of equity exercises its jurisdiction in favor of a judgment creditor only when the remedy afforded him at law is ineffectual to reach the property of the debtor, or the enforcement of the legal remedy is obstructed by some incumbrance upon the debtor's property, or some fraudulent transfer of it.

In the second case, the equitable relief sought rests upon the fact that the execution was issued, and a specific lien has been acquired upon the property of the debtor by its levy, but that the obstruction interposed prevents a sale of the property at a fair valuation. It is to remove the obstruction, and thus enable the creditor to obtain a full price for the property, that the suit is brought.

Jones vs. Green, 1 Wallace, 330.

26. If at the time when the sale of the property in controversy, upon which the defendants rely, was made, there was no decree of the Equity Court in existence that authorized the sale to be made, then said Equity Court had no power to make it to have been or be a valid sale by a mere order of confirmation, and the sale remained a nullity.

Wilcox vs. Jackson, 13 Peters, 499.

Shriver's Lessee vs. Lynn, 2 How., 43, 60.
Hickey vs. Stewart, 3 How., 750.
Williamson vs. Berry, 8 How., 496, 546.
Brigniadello vs. Gray, 1 Wallace, 627.
Minnesota vs. St. Paul, &c., 2 Wallace, 640; 8 Maryland, 322.

27. It is a legal question whether or not there was a decree that authorized the sale, in existence and force at the time when the sale was made; one to be determined from an inspection of the entire record in the cause in which the sale is claimed to have been made.

Exchange Bank vs. Inloes, 7 Md., 380.

28. There was no suit pending, when the sale was made, in which it could have been ordered, in which it could be made, or in which it could be ratified and confirmed. For the suit was simply and wholly a *litis contestatio* between Moore, styled Moore & Co., as plaintiff, and Kirk and certain persons appearing to have interests in the lands under him, as defendants; and no order or decree ever made any other person a party to the suit as plaintiff, without which order or decree no person could become such. (Ex parte Cutting.)

29. At the date of the rendition of the magistrate's judgments in favor of Moore & Co., and thence continuously until the filing of the bill, neither the land nor Kirk's supposed interest therein could have been seized and sold to satisfy said judgment, in consequence of the existence of a statutory enactment to the contrary. (See act of March 1st, 1823, sec. 2, 3 Stat., 743.)

30. There was also then existing a positive statutory enactment that prohibited such judgments being made judgments of the then Circuit Court, whereon an execution could issue from the Circuit Court under which the lands or Kirk's supposed interest therein could be sold. (See act

March 1st, 1823, sec. 8, 3 Stats., 743; and see act June 1st, 1870, sec. 3, 16 Stats., 146.)

31. Therefore, inasmuch as the the lands or his supposed interest therein could not be taken in execution to satisfy the judgments, no transfer by him of the lands or of his interest therein could be fraudulent as against the owners of the judgments.

Clarke vs. White, 12 Peters, 196.
Bump on Fraudulent Conver., 453; 1 Wendell, 414.
Gough vs. Henderson, 2 Head, 628, 632.
Splawn vs. Martin, 17 Arks., 146.
Cook vs. Cook, 12 Ark., 382.

32. If the magistrate judgments could have been made judgments of the Circuit Court, and Moore & Co. failed to make them such, then Moore & Co. had not exhausted their legal remedy, and there was no jurisdiction in the court of equity.

Cripper vs. Hudson, 13 N. Y., (3 Kernan,) 165.
Dix vs. Briggs, 9 Paige, 595.
Coe vs. Whitbeck, 11 Paige, 42.
McElwain vs. Willis, 9 Wend., 548.
Jones vs. Green, 1 Wallace, 331.
Beck vs. Burdett, 1 Paige, 307.

33. Of the questions presented by the case, I shall notice further only the principal ones, leaving the others to be discussed by my associate counsel. I hardly think, indeed, that it can be necessary to urge *any* further reason why the sale was invalid.

Moore, as Moore & Co., filed his bill against Kirk, showing that he held four judgments of a justice of the peace against him, impeaching two deeds of trust and one absolute conveyance of certain lands made by Kirk as fraudulent, intended to hinder, delay, and defraud *him* or *them*, Moore or Moore & Co., in the collection of the moneys adjudged to him, and praying that they might be so declared and the

lands sold for satisfaction of the judgments; or, if the deeds of trust were really made to secure the debts named in them, and the absolute conveyance was a valid mortgage, that the lands be sold, and these creditors being first paid, he might then have payment of his judgments out of the proceeds of sale. The decree ordered the trustee appointed to sell for payment of the complainant's claim, and others who might come in as creditors of Kirk, by petition, in the manner and form required by law and the practice of the court. This might have been supposed to mean creditors having right under the deeds to payment out of the proceeds, as *cestuis que trust* and mortgagees. But the court so proceeded in the case as to make this decree an invitation, promulgated *urbi et orbi* to any and all creditors of Kirk, to come to the court and share in the proceeds of sale of his property, which the court proposed to administer as a fund placed by the law in its hands. I think that the court had no fund in its hands for administration or distribution, and that everything done by it after the first sale, and satisfaction of the judgments held by Moore & Co., was *coram non judice*.

The court did not decide the two deeds of trust null and void, nor did the decree preclude the creditors secured by them from setting up their claims.

Hepburn vs. McDowell, 17 Serg. and R, 385.

34. The principal questions, however, are: first, whether the Equity Court ever had pending in it any suit or suits between a creditor or creditors of Kirk, and Kirk, to which Kirk was legally made a party, so that the court obtained power, authority, and jurisdiction to pass upon and adjudicate their claims against him; to decide what he owed each, and to decree sale of his lands for payment; and, second, whether, if it had, such sale was legally effected.

35. Moore, or Moore & Co., filed bill for himself alone to obtain payment of certain judgments rendered by a justice of the peace, by having cancellation of certain conveyances in trust as fraudulent against himself as a creditor; or, if

they were made on good consideration, to have the lands sold to pay first the debts secured by the deeds and then his judgments. The court decreed sale of part of the lands, lot 73, in square 465, and parts of 9 and 7 in square 437, in whole or in part included in each of the three conveyances; all to be sold, or so much thereof as might be necessary for payment of Moore's claim, *and of others who might come in as creditors of Kirk*, by petition, in the manner and form required by law and the practice of the court. None of the creditors provided for by the conveyances came forward. Two judgment creditors, the auditor reported, filed petitions after bill taken as confessed and before decree. They were not noticed on the record. It does not mention the filing of their petitions, and they were not made parties by any order of the court. Other creditors filed petitions afterwards, and no distinction was made between the others and these. The sale was made, and after paying Moore, $1,008 remained in the trustee's hands. Then the court ordered notice given to Kirk, a non-resident, by advertisement, of the filing of these petitions, and upon that notice distributed the moneys on hand among the judgment creditors.

The petitions were not *suits* against Kirk. There was no fund in the hands *of the court* which it had the right to distribute among creditors coming in by petition. If the court *intended* to set the conveyances aside as fraudulent, that did not constitute the proceeds of sale in that suit by a single creditor for himself, a fund for the court to administer.

36. Where a conveyance made by a person deceased is impeached by a creditor as fraudulent, and set aside as such, and the land sold, the fund is a common one, assets of the estate, to be administered, and belonging to all the creditors in common.

37. If there are various mortgagees, and persons having liens on particular lands, and to subject these to sale at the suit of one, a fraudulent conveyance is set aside, all the mortgagees and persons holding liens have an interest *in the*

fund, and it is in the hands of the court for them, and they can present their claims, and have distribution. *The possession of the fund* gives jurisdiction to the extent of the fund.

38. If a conveyance made by a bankrupt is set aside as fraudulent, and the property is sold, the whole *fund* is in the hands of the court, and it has jurisdiction to distribute it as assets of the bankruptcy.

39. But, outside of these classes of cases, if a single creditor of a living person files a bill to have cancellation of a conveyance as fraudulent, and sale of the property fraudulently conveyed, for payment of his judgment debt, and he is in a position to ask the aid of equity, and obtains the relief prayed, the conveyance is set aside *only as to him*, and whatever remains after paying him belongs to his debtor, and is not a fund in the hands of the court, to give it jurisdiction of other claims of creditors, on which no suit is brought in that court. The law has not made it a fund for the court to administer.

40. If another creditor could by petition be made a party before decree, he would institute thereby a suit against the debtor, service of process wherein would be as necessary to give jurisdiction as it was in the original suit by the first creditor.

41. The two creditors could not have at first united in a suit in equity to cancel the conveyance, and to have sale for the benefit of each, and payment in full of the claim of each.

42. Here were creditors by judgment in the Circuit Court, creditors by judgments of justices of the peace, creditors by notes, drafts, and on open account. Not one of them had any right to question and assail the conveyances made by Kirk, until he first, by some proper proceeding, should have obtained that right by force of a statute or of the law of the court of equity.

43. The practise of permitting judgment creditors to come

in and make themselves parties to a creditor's bill, and so obtain the benefit of it, is well settled.

Myers v. Fenn, 5 Wallace 205.

In that case the debtor had conveyed all his property to a general assignee for the benefit of his creditors. The suit became one against the debtor and his general assignee alone. There was, therefore, a common fund, in which all creditors were interested.

In Seaver v. Bigelows, 5 Wallace 211, the court said that, in the case of creditors' bills, new parties might come in at almost any stage of the proceedings, even after decree, "*if they can show an interest in the common fund.*"

In Kipp vs. Hanna, 2 Bland, 35, said by the chancellor: "It has also been long well established that, where a voluntary conveyance has been vacated for the benefit of those who were creditors at the time, all subsequent creditors may be let in to participate of the funds." But the plaintiffs were trustees, under the law, of an insolvent's estate, whose conveyance was vacated, and the court said: "The proceeds must be apportioned among them" (the incoming creditors) "according to the provisions of the insolvent laws."

The court takes upon itself the general administration of the assets of a deceased debtor on a creditors' bill, or that of a living *insolvent* debtor.

Hammond vs. Hammond, 2 Bland, 316.

44. Where a bond creditor brings a bill against an executor for an account of assets and for satisfaction, it is no objection, for want of parties, to say he has not brought other bond creditors, or creditors of a superior nature, before the court; for any one bond creditor may bring his bill, as the court decrees only an account, and directs the executor to pay in the course of administration, &c. (Anon., 3 Atk., 571.)

45. If there is any creditor whose debt would be preju-

diced by the voluntary settlement, it throws the subject into assets, and lets in all the creditors.

Montague vs. Lord Sandwich, cited in note, 12 Ves., 148, 156.

The bill there was filed by the natural children of the late Lord Sandwich. Deeds declared "void as against the creditors of the said John, late earl of Sandwich, who were creditors prior to the said deeds."

In Walker vs. Burrows, 1 Atk., 94, the deed claimed to be void as to creditors, to set aside which the bill was filed, was made by a person who afterwards became bankrupt, in behalf of the assignees in bankruptcy; decree that the trustees under the deed convey to the assignees.

46. One creditor may proceed in equity to vacate conveyances void under the statute of Elizabeth; and if successful, the fund arising from the sale of the property covered by them may be retained in court until the other creditors are notified to come in and assert their claims to participate.

Birely vs. Staley, 5 Gill & Johns, 432.

But the bill was filed to set aside a conveyance made by Jacob Staley, deceased, and against his sons, to whom he made it; and two creditors, out of many, filing the bill, prayed sale of the property for the benefit of the creditors.

Taney, arg., said that the unnamed creditors would have the right to come in under the decree and participate in the fund, and that the bill was essentially a creditors' bill.

On the other side it was insisted that two creditors only could not file the bill, but *all* must be made parties, either by joining them as complainants or calling them in as defendants, or by representation, by exhibiting the bill expressly in behalf of the complainants and all other creditors who might come in.

The court said: "If one of many creditors proceed, &c., and that the bill really was filed for the benefit of all."

47. Whether to subject goods fraudulently conveyed, or to have decree to be allowed to redeem a mortgage of a leasehold estate and bond creditor, a judgment creditor must have taken out execution, "because, till execution, the plaintiff has no lien on the leasehold estate."

Shirley v. Watts, 3 Atk., 200.

Wylie v. Basil, 4 Maryl., Ch. Decis., 329.

In Brinton v. Hook, 3 Maryland Ch. Decisions, 477, where judgment creditors of a person living filed a bill to have a conveyance cancelled as fraudulent, and sale of the property for payment of complainant's debt and other crediors, the debtor had applied for the benefit of the insolvent laws.

48. Where the creditors are to be paid out of a particular fund, or are united in the same transaction *so as to produce a privity between them*, all are to join in a bill to set aside a release which affected all the creditors equally. All must be parties, either by name or as being represented by a part, suing in the names of all.

Joy v. Wirtz, 1 Wash. C. C., 418.

49. Where a lien creditor brings a bill in behalf of himself and other creditors *of the same class, and with similar rights*, the decree should provide proper relief for all of them.

Trustees v. Beers, 2 Black, 443.

In that case a bondholder sought payment, for himself and all other holders of like bonds, out of a specific fund in the hands of trustees, to whom the entire property of a canal company had been conveyed. The court held that the decree should declare *equality of lien* of all the bondholders with the plaintiff, and give them the same relief as it gave him, to which end they were to be allowed to come in.

50. A creditor may file a bill in a case of administration for payment of his own debt and seek a discovery of assets for this purpose only. If he does so, and account is decreed

to be taken, the court, on the footing of the account, proceeds to make final decree in his favor. On a bill so brought by a single creditor for his own debt only, no *general* account of debts is usually directed to be taken; and the decree is that the particular debt be paid in due course of administration.

But the court may, on such a bill, make a more general decree in the form of a decree upon a general creditor's bill. If the executor or administrator admits assets, the creditor bringing the bill may have a decree for payment of his own debt only; the reason being that, by admitting assets, the executor makes himself personally liable, and the other creditors cannot be prejudiced by payment of the particular debt in full.

But where "the purposes of justice" require it, the court may treat the case as if the one creditor sued, representing all. For example, if it appeared that the assets of the estate would suffice to pay only a per-centum of the debts, the court would assume the administration, bring in all the creditors, and distribute the fund.

In short, where there is a fund to be distributed, either in a case of administration or in one of bankruptcy or insolvency, and the fund will not suffice to pay in full all the creditors who have an interest in it, if one files a bill to have payment, or to make available to the fund property fraudulently withheld from it, the decree will be for the benefit of all the creditors, and all may come in under the decree. But this is the case only where *all* the property of the deceased person, the bankrupt or insolvent, is to be administered in the suit, or the fund is one in which the creditors have a common interest—a joint specific interest.

As Wigram, V. C., said, in Wodgate vs. Field, 2 Hare, 211, "If the creditor, and the executor defendant can settle the matter pending the suit by the latter paying the debt and costs, and if the court can order this done, where is the line to be drawn, beyond which the plaintiff cannot be allowed to have the exclusive benefit of his own suit?" If Kirk,

or any one for him, had, before sale under the decree, tendered full payment to the sole creditor who filed the bill, could the suit have gone on for other unnamed creditors?

51. Courts of equity entertain creditors' bills in cases of administration to secure an equitable distribution of the assets without preference to any one or more creditors.

Story Eq. Jurisp., § 547.

52. It is wholly on the ground that it appears *that there will be a deficiency in the fund*, that all the creditors are required to be brought, or allowed to come, in under a bill filed by a single creditor.

Hallett vs. Hallett, 2 Paige, 18, 19.

53. Chancellor Walworth well stated the ground of the jurisdiction in Hallett vs. Hallett, 2 Paige, 19: "If there are many parties standing in the same situation as to their rights or claims upon a particular fund, and where the shares of a part cannot be determined until the rights of all the others are settled or ascertained, as in the case of creditors of an insolvent estate or residuary legatees, all the parties interested in the fund must in general be brought before the court, so that there may be but one account and one decree settling the rights of all."

And he said in another case that if it appeared on the face of the bill that there would be a deficiency in the fund, and that there were other creditors or legatees entitled to a rateable proportion with the complainants, such creditors or legatees must be made parties to the bill, or the suit should be brought by the complainants on behalf of themselves and all others standing in a similar situation, and it should be so stated in the bill.

Egberts vs. Wood, 3 Paige, 520.

The court below did not assume the administration of part

of the estate of Kirk as an absentee, and benevolently invite all men who could trump up a claim against him to come in and share the proceeds of sale of the property, on the ground of deficiency of assets or deficiency in a fund. On the contrary, it rejected the only possible ground on which this extraordinary procedure could be justified, *by paying Moore's claim in full;* and when that had ended the case, went on to permit another sale, and distribute the residue of the moneys *pro rata.*

55. It has been held that a mortgagee cannot sue in behalf of himself and all other creditors, because he has no common interest with them; and when a creditor sues in behalf of all, it is permitted upon the ground of there being a common interest in all. So if the plaintiff seeks to establish a *peculiar* right, or a priority of right or charge: for each creditor has a distinct right and interest to contest the plaintiff's claim. Recent authorities hold a contrary doctrine. (For the cases, see Story, E. Pl., §§. 99, 101.)

56. However that may be, he may undoubtedly file his bill *pro interesse suo* only. But if it should appear that, if he is paid in full, there will be a deficiency in the fund, the court would compel him to make the other creditors parties, or permit them to come in and contest his claim and demand equality of distribution.

57. For it has been held, and so it must necessarily be, that if he files his bill on behalf of all creditors, they are so far parties to the suit, that they have a right to appear and contest the validity of his asserted priority over other creditors.

Whitaker vs. Wright, 2 Hare, 310.

Owens vs. Dickenson, 1 Craig & Phill, 48, 56.

58. So, necessarily, it must be, I say. For, in so far as he claims that he is entitled to be paid by the debtor, his suit

is against the debtor; but in so far as he claims that he is entitled to preferment and priority, the other creditors, who are to suffer and lose by it are the Rei, and his suit is against them. Properly, therefore, he should not sue in their behalf, but should make them defendants; and when once he has proved the indebtedness, the debtor has no further interest in the controversy, any more than the carcass has in the disputes for preference and priority among the vultures that are devouring it.

59. Generally, indeed, the debtor is but a nominal party—as in cases of bankruptcy, insolvency, and trusts for creditors, by deed; and in cases of administration, where the assets are less than the debts. Generally the suits are essentially controversies between creditors, although the court may require all to be made parties by representation, for convenience sake, and distribute the fund in one suit.

Story, E. Pl., §§. 102,103.

Cockburn vs. Thompson, 16 Ves., 327.

60. In suits by legatees, all are required to be brought before the court, whenever it appears that there will be a deficiency in the fund.

Story, E. Pl., §. 104.

61. And it is so much in reality a suit between the legatees, that if one is not before the court, those who are paid may afterwards be decreed to refund, *pro rata*, to make up what should have been decreed to him. So undoubtedly it would be, if one creditor being absent without fault of his own, the whole of a fund has been distributed among the other creditors.

David vs. Frowd, 1 Myl. & Keene, 200.

Gillespie vs. Alexander, 3 Russ., 130.

There was no fund in the hands of the court to be administered and distributed. There was no suit asking any such

Supreme Court of the United States.

No. 279.

GEORGE E. KIRK, PLAINTIFF IN ERROR,

vs.

CHARLES O. HAMILTON AND CATHARINE HAMILTON.

In Error to Supreme Court of the District of Columbia.

BRIEF FOR DEFENDANTS IN ERROR.

R. T. MERRICK,
M. F. MORRIS,
For Defendants in Error.

Judd & Detweiler, Printers.

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BRIEF FOR DEFENDANTS IN ERROR.

I.

STATEMENT.

This is a suit in ejectment brought by the plaintiff in error against the defendants to recover certain real estate in the city of Washington, D. C., designated as lots 7 and 9 in square 437. The defense is, that the plaintiff's right and title in the property had been sold under a decree in equity, and purchased by the defendants, who had gone into possession of it under their purchase and the trustee's deed to them, and who had made improvements on the land with the knowledge and without objection of the plaintiff, who lived adjacent to the property in controversy.

It appears from the record, that, in 1859, one D. W. Moore filed his bill in equity to enforce certain judgments,

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which he had obtained before justices of the peace, against the present plaintiff in error Kirk, and to subject to their satisfaction certain real estate of which the equitable and beneficial ownership was alleged to be in Kirk. Personal service was had on the latter and other defendants in the case. But the suit was permitted by them to go by default; and a decree was rendered, in 1860, for the sale of lots 7 and 9 in square 437, and lot 78 in square 465, or so much thereof as might "be necessary, for the payment of the "complainant's claim and others who might come in as "creditors of Kirk, by petition in the manner and form re-"quired by law and the practice of the court."

The trustee appointed by the decree thereupon advertised the three lots mentioned; but sold only one, lot 78 in square 465. Other creditors of Kirk had intervened in the case, both before and after the decree, by filing petitions in the case. The auditor of the Court, in stating the trustee's account, disallowed all claims, except that of the complainant in the suit, on the ground that Kirk had received no notice of them or of the filing of the petitions.

Subsequently, in 1863, an order of publication was made by the Court, requiring Kirk to appear and answer these petitions. He failed to do so; an order *pro confesso* was entered against him; and a second reference was made to the auditor.

The sum in the trustee's hands being insufficient to satisfy the claims of these petitioning creditors, the auditor distributed it *pro rata.*

The trustee then advertised for sale the other property specified in the original decree to be sold; and having adjourned the proposed sale from the 14th to the 19th of April, 1864, he then sold lots 7 and 9, in square 437, to the defendants in error. His sale was ratified by the Court. A third order of reference was made to the auditor, and that officer distributed the proceeds of sale, and the trustee

executed a deed of conveyance of the property to the purchaser.

At this third reference, in 1865, Kirk, who had just returned from the south, appeared before the auditor, and contested some of the claims; and those claims contested by him were rejected.

In 1868, Hamilton improved the property bought by him. While he was building, Kirk claimed title to three feet of the lot—a claim which he afterwards abandoned; but he set up no claim whatever to the residue.

At the time of the institution of the suit in 1859, the title to lots 7 and 9 was in one Stott, and the bill alleged that he held it in secret trust for Kirk. Upon that assumption the subsequent decree of sale was based. In 1872, Kirk took a deed to himself from Stott; and thereupon begun this ejectment suit.

II.

BRIEF OF ARGUMENT.

Plainly, the main question, and indeed almost the only question in this case is, whether the proceedings in the equity cause of Moore *vs.* Kirk can be attached collaterally in the present suit. And this depends on the further question, whether the court of equity had jurisdiction in the proceedings which led to the title obtained by the defendants.

1.

The distinction between irregularities in the exercise of undoubted jurisdiction and the utter absence of jurisdiction to proceed at all, is very well established by repeated adjudications on the subject.

Voorhees *vs.* Bank of U. S., 10 Peters, 473.
Thompson *vs.* Tolmie, 2 Peters, 157.
Ludlow *vs.* Ramsey, 11 Wallace, 581.
Cooper *vs.* Reynolds, 10 Wallace, 308.

The distinction is equally well established between total want of jurisdiction on the one side, and erroneous conclusions of law, plainly reversible on appeal, on the other.

Voorhees *vs.* Bank of U. S., 10 Peters, 474.
Thompson *vs.* Tolmie, 2 Peters, 157.
Ludlow *vs.* Ramsey, 11 Wallace, 581.
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Now, even if it be conceded that there were grave and serious irregularities in the equity proceedings in question, and that the decrees of the court of equity complained of by the plaintiff in error would certainly be reversed on appeal, yet, unless those proceedings were without jurisdiction, they are to be taken as conclusive, until so reversed on appeal.

Were these proceedings beyond the jurisdiction of the court of equity? On the part of the defendants, it is submitted that they were not.

The subject-matter of the original bill of the complainant Moore, undoubtedly stated a case proper for the cognizance of a court of equity. Personal service of process under that bill gave jurisdiction of the person. There can be no doubt, therefore, of the fact, that the first decree in the case, that of May 30, 1860, directing the sale of lots 7 and 9 in square 437 and lot 78 in square 465, was within the jurisdiction of the court.

The brief on behalf of the plaintiff in error (page 24, point 29,) states that the judgments, on which Moore's bill in equity were filed, were prohibited by positive statutory enactment from being a lien on land; and (page 23, point 24) that, in order to maintain a creditors' bill judgments must be a specific lien on the property.

There is no such statutory enactment. The act of March 1, 1823, section 2, (3 Stat. 743,) cited to that effect by the plaintiff, is entirely misunderstood by him.

Lands may be seized and sold in the District of Columbia

on execution issued in pursuance of judgments rendered by justices of the peace.

Act of March 1, 1823, Secs. 9 and 13, (3 Stat. 745.)
Alexander's British Statutes in force in Maryland, p. 716 and notes.

Moreover, whether a case stated in a bill is a proper subject for the action of a court of equity, is always, after personal service of process, a question to be decided in that case by the court itself, or by some appellate tribunal, and not to be determined collateralty in some other case.

Voorhees *vs.* Bank of United States, 10 Peters, 474.
Ex parte Watkins, 3 Peters, 193, 209.
Grignon *vs.* Astor, 2 Howard, 338.
Cocke *vs.* Halsey, 16 Peters, 87.
Parker *vs.* Kane, 22 Howard, 1.
Harvey *vs.* Tyler, 2 Wallace, 328.
Mattingly *vs.* Nye, 8 Wallace, 370.

It was not seriously questioned, it seems, in the court below, that the proceedings in the equity suit up to and including the decree of sale were valid; and the exceptions taken at the trial seem to attack merely the subsequent proceedings for the benefit of Kirk's creditors, other than Moore.

In the case of creditor's bill for the administration of assets, it makes no difference whether the bill be brought by one or more creditors against the executor or administrator solely on his or their own behalf, or whether it be brought on behalf of themselves and all other creditors; provided that, upon such a bill, a general decree is made for the benefit of all the creditors. For then it is in the nature of a judgment for all the creditors; and all are entitled to have notice, and to come in, and to prove their debts before the master.

Story's Equity Jurisprudence, Vol. 2, Sec. 690.
Thompson *vs.* Brown, 4 Johnson's Ch., 619.
Benson *vs.* Leroy, 4 Johnson's Ch., 651.

And the same rule is applicable to bills of the character of the one in this case, which are usually denominated bills in the nature of creditor's bills.

Strike *vs.* McDonald, 2 Harris & Gill, 191.
Strike's Case, 1 Bland, 57.
Story's Equity Jurisprudence, Vol. 2, Sec. 1216 b.
Mackubin *vs.* Brown, 1 Bland, 410.
Williamson *vs.* Williamson, 1 Bland, 418.

2.

Now, the decree of May 30, 1860, was, inaccordance with the rule laid down in the authorities cited, a general decree for the benefit of all the creditors; and it directed a sale of the property in controversy in the present case. The trustee was authorized to sell all the property mentioned in the decree, or so much thereof as might be necessary for the payment of all the claims that might come in which could be enforced against the property.

The first sale did not satisfy this commission; and the second sale was required for the purpose. The second sale was plainly in execution of the first decree, unless the power of sale was exhausted by the fact that enough was realized under the first to satisfy all the claims that could be enforced in that suit. But this depends on the question, which we think we have settled, whether the decree in the first instance should or could have provided for other creditors than the complainant Moore.

3.

Moreover, the plaintiff in error seems to be estopped by two circumstances from denying the validity of the sale to Hamilton: 1st. Because he appeared before the Auditor in 1865 on the reference for the distribution of the proceeds of sale; and it was his duty then to have objected to the sale and to the jurisdiction of the Court, if he had any such

objection to make; and 2d. Because he stood by, while Hamilton was making improvements on the property, and made no claim to it, although it was his duty to make his claim then, if he thought he had any. And it is no answer to this last point, that the plaintiff now relies on the subsequently acquired title from Stott. That title was involved in the original proceedings, and had been declared fraudulent by the first decree of the Court.

The doctrine of estoppel is laid down in—

Brant *vs.* Virginia & Co., 3 Otto, 326.

4.

The judgment in this case must necessarily have been in favor of the defendants, as the plaintiff had no legal title to the property in himself, other than the deed to him from Stott in 1872 (Record, p. 50,) which, besides the fact that Stott had already been decreed to have no valid title, was void as against Hamilton, on well-known grounds of law. A deed by a party out of possession is void as against the party in possession holding adversely.

5.

It is submitted that the judgment below should be affirmed.

R. T. Merrick,
M. F. Morris,
For Defendants in Error.